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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

STANLEY HENRY, Individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

*Petitioner,*

vs.

JAMES W. WETZLER, as Commissioner of the New York State Department of Taxation and Finance, and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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10 pp

## QUESTIONS PRESENTED

1. Whether the New York State Department of Taxation and Finance's interpretation of the word "sale" within New York Tax Law § 1101 (b) (5) violated the First Amendment guarantee of a free press because (i) that interpretation resulted in a tax on publishers of free circulation newspapers but no tax on publishers of paid circulation newspapers, and (ii) the discrimination cannot be justified as necessary to serve a "compelling" state interest.

2. Whether the New York State Department of Taxation and Finance's interpretation of the word "sale" within New York Tax Law § 1101 (b) (5) violated petitioner's Fourteenth Amendment right to equal protection because (i) that interpretation resulted in a tax on publishers of free circulation newspapers but no tax on publishers of paid circulation newspapers, and (ii) the discrimination cannot be justified as being "rationally related" to a legitimate state interest.

## PARTIES

The names of all parties to the proceeding in the court that issued the decision which petitioner seeks to have reviewed here appear in the caption of the case.

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IN THE

SUPREME COURT OF THE UNITED STATES

STANLEY HENRY, Individually and on behalf of
CHANRY COMMUNICATIONS, LTD.,

Petitioner,

vs.

JAMES W. WETZLER, as Commissioner of the
New York State Department of Taxation and Finance, and
TAX APPEALS TRIBUNAL OF THE
STATE OF NEW YORK,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## OPINIONS BELOW

The memorandum opinion of the New York Court of Appeals is officially reported at ___ N.Y.2d ___ (1993) and reproduced at Pet.App. A 3. The opinion and judgment of the New York Supreme Court, Appellate Division, Third Department is officially reported at 183 A.D.2d 57 (3rd Dep't 1992) and reproduced at Pet.App. A 9. The opinion of the New York Tax Appeals Tribunal is unreported but reproduced

at Pet.App. A 31. The opinion of the New York Department of Taxation and Finance, Division of Tax Appeals is unreported but reproduced at Pet.App. A 16.

## JURISDICTION

The opinion of the New York Court of Appeals, affirming the judgment of the New York Supreme Court, Appellate Division, Third Department, was entered on December 15, 1993. (Pet.App. A 3). This petition was filed within 90 days following the entry of the Court of Appeals' opinion, pursuant to Rule 13.1 of this Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (1993) because "the validity of a statute ... is drawn in question on the ground of its being repugnant to the Constitution."

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The determination of the requested appeal would involve consideration of the First and Fourteenth Amendments to the United States Constitution. (Pet.App. A 52, 53). It would also involve consideration of Sections 1101 (b) (5), 1115 (a) (12) and 1115 (c) of the New York Tax Law (Pet. App. A 54, 55, 57), and consideration of Section 526.7 (a) (1) of the New York Tax Regulations. (Pet.App. A 60).

## STATEMENT OF THE CASE

This case warrants hearing for four reasons, each of which is related to the constitutional guarantee of a free press.

I. Review would present a critical constitutional issue of first impression. New York imposes a tax on free circulation newspapers that is not imposed on paid circulation newspapers. This discrimination among newspapers is similar to that arising from the face of the statutory exemption struck down in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*[1] However, the result here arises from an interpretation of a statute. Under existing authority, the court below felt free to ignore the effect of the interpretation and merely examine the face of the statute, which it found valid as being of "general applicability". Review would resolve whether New York may effect through interpretation what this Court prohibits through legislation.

II. This discrimination is particularly dangerous because the effect on free circulation newspapers bears on content. The content of free circulation newspapers is different than that of paid circulation newspapers; the former focuses on local community news and events, and disseminates unorthodox opinions, while the latter concentrates on regional, national and international developments, and furthers more traditional views.

III. Review would allow this Court to harmonize three aspects of its opinions defining invalid discriminatory taxation

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1 460 U.S. 575 (1983).

of the press.[2] First, this Court held in *Leathers* that states may impose more burdensome tax treatment on one segment of the press than other segments. However, it struck down in *Minneapolis Star* a tax imposed on just one segment of the press, newspapers. The Court did state in *Minneapolis Star* that it acted because the tax "singled out the press"; however, the tax under review, which concerned the use of paper and ink, did not affect all segments of the press; it only affected newspapers. *Leathers* and *Minneapolis Star* are contradictory.

Second, this Court stated in *Leathers* that in *Minneapolis Star* and *Arkansas Writers'* it had addressed "differential taxation of First Amendment speakers" and did not refer to the press. Then, after holding that the tax under review in those cases did not fall into any of the three defined categories of improper discrimination, the Court found no "additional basis" to strike the tax down;[3] the Court analyzed the asserted "additional basis" under two authorities having nothing to do

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[2] *Leathers v. Medlock*, 499 U.S. 439 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575 (1983).

[3] The reference to an "additional basis" is itself problematic. In *Arkansas Writers'* the Court stated that "we need not decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax * * *" *Arkansas Writers'*, 481 U.S. 221, 233. This suggested that discrimination against one segment of the press could itself be an "additional basis" to strike down a tax. However, in the *Leathers* opinion discrimination against one segment of the press was characterized as a unique circumstance for which an "additional basis" would have to be found before the tax could be stricken. *Leathers*, 499 U.S. 439, 449.

with the press.[4] This suggests that the holding in *Leathers* improperly rested on considerations respecting speakers rather than the press.

Third, this Court has consistently stated that discriminatory taxation of the press may be invalid regardless of the government's intent; however, language utilized by the Court in recent opinions suggests that intent is relevant. *Minneapolis Star* and *Arkansas Writers'* refer to a state's "singling out" of the press, or the "targeting" of a subset of the press. This Court defended the tax at issue in *Leathers*, finding no indication of "a purposeful attempt to interfere with [cable television's] First Amendment activities." "Singling out", "targeting" and "purposeful" connote intent.

IV. Review would also raise the acknowledged relationship between discrimination among members of one segment of the press and the guarantee of equal protection under the Fourteenth Amendment. Discrimination is unequal treatment. Effectively unequal taxation among those comprising one segment of the press should not withstand equal protection scrutiny when a state's only asserted interest is raising revenue. While raising revenue is "legitimate", it cannot be rational to do so through discriminatory taxation when it can be done evenhandedly.

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4 *Leathers*, 499 U.S. 439, 450-52 (citing *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (tax exemption for lobbyists), and *Cammarano v. United States*, 358 U.S. 498 (1959) (deductibility of donation for lobbying).

## Statement of the Facts

Petitioner's company, Chanry Communications, Ltd. ("Chanry"), published community newspapers. Its business involved the solicitation of advertising, the production of newspapers containing both the solicited advertising and editorial material (the "Papers"), and the manual distribution of the Papers to the general public.

All newspapers derive the bulk of their revenue from advertising. Some finance their operations entirely from advertising revenue, and distribute their newspapers without charge to the entire public ("Free Circulation Press"). Others finance their operations primarily through advertising revenue, supplemented by revenue received from the recipients of the newspapers, this distribution revenue typically being less than 10% of total revenue ("Paid Circulation Press"). The Papers were part of the Free Circulation Press.

The sample editions of the Papers, made a part of the record below, reflect substantial community-centered editorial content.[5] This content was more than sufficient to classify the

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[5] References to the record in the court below will be indicated "Rec. A 1" et cet. Sample editions of the Papers are reproduced at Rec. A 460, 520, 675, 747 and 827. A typical edition of the Papers included:

- a cover story regarding the form of government in Oyster Bay, New York (Rec. A 460)
- a full page of articles regarding the budget of the schools in Hicksville, New York, a local civic association, a change in speed limits, school district candidates and the 40th anniversary of Levittown, New York (Rec. A 462)
- an article regarding Entenmann bakery (Rec. A 463-64)
- the police blotter and obituaries (Rec. A 465)

(continued...)

Papers as newspapers under common and statutory law, which respondent never denied throughout the administrative process.[6] Furthermore, the Papers had far more editorial content than Mr. Henry's current free circulation newspaper, *This Week*, which the District Court deemed a newspaper for purposes of the First Amendment. *Distribution Systems of Am., Inc. v. Village of Old Westbury*, No. CV 91 5060 (E.D.N.Y. January 10, 1991) (motion for preliminary injunction granted).

Between 1982 and 1985 Chanry purchased machinery to produce its Papers, which it operated with electric power (the "Machinery and Power"). New York exempts from taxation purchases of machinery and power used in the production of tangible personal property for "sale". New York Tax Law §§ 1115 (a) (12) and 1115 (c) (McKinney 1987) (the "Manufacturing Exemptions") (Pet.App. A 55, 57). A "sale" is defined as any transfer of title or possession "for a consideration". New York

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5 (...continued)

- articles regarding the organization Mothers Against Drunk Driving and the practice of organ donation (Rec. A 469)
- opinions regarding repairs to the county jail, F.C.C. regulations and political editorials (Rec. A 471-72)
- letters to the editor (Rec. A 471)
- restaurant information and reviews (Rec. A 490).

6 The New York Tax Regulations define a newspaper as a publication that is published in stated, short intervals, does not constitute a book, is available for circulation to the public, and contains matters of general interest and reports of current events. 20 N.Y.C.R.R. § 528.6 (b) (1) (1979) (Pet.App. A 61); see *Scotsmen Press, Inc. v. New York State Tax Appeals Tribunal*, 165 A.D.2d 630 (3rd Dep't 1991); and see *G & B Publ. Co., Inc. v. Dep't of Taxation and Fin.*, 57 A.D.2d 18 (3rd Dep't 1977), lv denied, 42 N.Y.2d 807 (1977).

Tax Law § 1101 (b) (5) (McKinney 1987); 20 N.Y.C.R.R. § 526.7 (a) (1) (1982). (Pet.App. A 54, 60). Chanry claimed the Manufacturing Exemptions because the Papers were "sold" within the meaning of New York Tax Law §1101 (b) (5) since possession of the Papers was transferred to the public "for a consideration", i.e., monies paid by the advertisers, which fully financed the production and distribution of the Papers.

**Proceedings Below**

On or about September 11, 1984 the New York State Department of Taxation and Finance, Division of Taxation (the "Division") commenced an audit of Chanry's books and records which, ultimately, covered the period of October 1, 1982 through February 28, 1985. On July 10, 1987 the Division issued to Chanry and Petitioner, as a responsible corporate officer, notices of determination assessing a sales tax deficiency of $246,719.59 arising from the Division's denial of Chanry's claim to the Manufacturing Exemptions. The Division concluded that the Papers had not been produced for "sale" within the meaning of New York Tax Law § 1101 (b) (5), asserting that the consideration necessary to support a "sale" must come from the recipient of the transferred property.

On May 9, 1988 the Division held a conciliation conference. Under cover of a letter dated July 15, 1988, the conferee issued an order sustaining the assessment.

On September 30, 1988 Mr. Henry petitioned the New York State Department of Taxation and Finance, Division of Tax Appeals, for a determination that Chanry was entitled to the Manufacturing Exemptions. By its written determination

of April 12, 1990, the Division of Tax Appeals rejected Chanry's position, concluding that the Papers were not "sold" because the consideration supporting the transfers of the Papers did not come from the recipients of the Papers, the public. (Pet.App. A 25).

Mr. Henry took an appeal to the New York Tax Appeals Tribunal (the "Tribunal"). By its decision of March 7, 1991, the Tribunal affirmed the denial of the Manufacturing Exemptions, again holding that the Papers were not "sold". (Pet.App. A 41).

Mr. Henry commenced a special judicial proceeding in the New York Supreme Court, Appellate Division, Third Department, pursuant to Article 78 of the New York Civil Practice Law and Rules. This was his first opportunity to argue that the Division's interpretation of what constituted a "sale" with respect to the Manufacturing Exemptions improperly burdened freedom of the press under the First Amendment and violated Chanry's rights to equal protection under the Fourteenth Amendment.[7]

The Appellate Division affirmed the administrative determination, though it refrained from discussing the constitutional issues. (Pet.App. A 14). Therefore, Chanry moved for clarification, and for permission to appeal to the New York Court of Appeals; the motion was denied. (Pet.App. A 15).

On June 30, 1993 Mr. Henry appealed to the New York Court of Appeals, briefing fully the statutory construction and

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[7] It was never challenged below that the Paid Circulation Press was benefitted in a way that the Free Circulation Press was not.

constitutional issues.[5] By its opinion dated December 15, 1993, the New York Court of Appeals affirmed, without mentioning the equal protection issue, and giving only brief comment to the free press issue.

> * * * The flaw in petitioner's argument is that, unlike the statutes in Minneapolis Star & Tribune v Minnesota Commr. of Revenue (460 US 575) and Arkansas Writers' Project, Inc. v. Ragland (481 US 221; see also, Leather v Medlock, __ US __, 111 S Ct 1438), this tax scheme is not directed at the press in general or at a particular class of news entities. Rather, it is a set of "generally applicable economic regulations" designed to ensure that the incidence of the tax falls only on the last transaction in the production chain (Minneapolis Star & Tribune v Minnesota Commr. of Revenue, supra, p 581). Under the statutory scheme, the exemption is denied to any business that does not produce a product "for sale". Its application to petitioner's business thus presents no "constitutional problems" (id.).

(Pet.App. A 5). The court disregarded the effect of the State's interpretation of a "sale", which triggers one's entitlement to the Manufacturing Exemptions, focusing instead on the "general applicability" of the Manufacturing Exemptions. It read this Court's decisions as prohibiting only discrimination resulting from express statutory language that was "directed" at either the entire press or a "particular class of news entities".

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[5] Petitioner appealed as of right and also moved for leave to appeal; his motion for leave was denied because jurisdiction lay as of right. (Pet.App. A 1).

## REASONS WHY THE PETITION SHOULD BE GRANTED

I. Review would present an issue of first impression, whether a state may discriminate among members of one segment of the press by *interpreting* a tax statute that is, upon its face, generally applicable.

II. Review would allow this Court to reverse a state court decision that conflicts with decisions of this Court barring discriminatory taxation of the press that is not content neutral.

III. Review would allow this Court to harmonize three aspects of its decisions defining invalid discriminatory taxation of the press. First, *Minneapolis Star* struck a tax that affected only one segment of the press while *Leathers* allowed a tax that affected only one segment of the press. Second, *Leathers* is supported by authority protecting "speakers" rather than the press, leaving doubt as to whether these distinct First Amendment values will be treated the same. Third, all three decisions reject the requirement of censorial intent but use contrary language connoting intent. This vague precedent has been misapplied in the state courts.

IV. Review would allow this Court to clarify the acknowledged relationship between freedom of the press and the right to equal protection in analyzing discriminatory taxation among members of one segment of the press.

## ARGUMENT

### I.
### A WRIT SHOULD ISSUE BECAUSE REVIEW WOULD PRESENT AN ISSUE OF FIRST IMPRESSION, WHETHER A STATE MAY DISCRIMINATE AMONG MEMBERS OF ONE SEGMENT OF THE PRESS BY INTERPRETING A TAX STATUTE THAT IS, ON ITS FACE, GENERALLY APPLICABLE

Review would allow this Court to clarify that a state may not discriminate through interpretation of a sales tax statute even if the statute is, upon its face, generally applicable to all businesses.

The press[9] is subject to taxes of "general applicability".[10] *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575, 581 (1983). However:

> "[t]here is nothing talismanic about neutral laws of general applicability," for such laws may restrict First Amendment rights just as effectively as those directed specifically at speech itself.

*Cohen v. Cowles Media Co.*, ___ U.S. ___, ___, 111 S.Ct. 2513, 2522 (1991) (Souter, J., dissenting) (quoting *Employment Div.*,

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[9] "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); but see *City of Los Angeles v. Preferred Commun., Inc.*, 476 U.S. 488, 494 (1986) (press includes cable television).

[10] This Court has stated that discrimination may be "justified by some special characteristic of the press", though this has never been explained. *Minneapolis Star*, 460 U.S. at 585.

*Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring)).[11] Therefore, this Court has sought to establish guidelines for determining whether discriminatory taxation of the press violates the First Amendment. *Leathers v. Medlock*, 499 U.S. 439 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star*, 460 U.S. 575 (1983).[12]

This body of law recognizes four categories of improper taxation.[13] The triggering wrong is unequal effect.

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11 This Court has gone so far as to state that *any* tax on the "exercise" of First Amendment rights is prohibited. *Murdock v. Commonwealth of Penn.*, 319 U.S. 105, 108 (1943). However, it not clear whether that principle survives. *Minneapolis Star*, 460 U.S. at 586, n. 9; and see *Swaggart Ministries v. Cal. Bd. of Equal'n*, 493 U.S. 378, 385-88. (1990).

12 It has been asserted that tax exemptions are a government subsidy to which no one is entitled; the argument is that denial of an exemption raises no First Amendment concerns. *Arkansas Writers'*, 481 U.S. at 235 (Scalia, J., dissenting). However, taxation is a barrier, and by the denial of an exemption the government burdens just as directly as when it taxes; granting an exemption to only some in a single market is a powerful tool of choice. Therefore, the law prohibits such denial. *Arkansas Writers'*, 481 U.S. at 237; and see *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

13 The first category is taxation that "singles out the press". *Minneapolis Star*, 460 U.S. at 592. The second is taxation that "targets individual publications within the press". *Id*; this has been restricted to taxation targeting a "small group within the press." *Arkansas Writers'*, 481 U.S. at 229. The third is taxation that differentiates based upon content. *Arkansas Writers'*, 481 U.S. at 229. The fourth, or the "additional basis", is when "intermedia or intramedia discrimination" is accompanied by either "evidence of intent to suppress speech", or an "effect on the expression of particular ideas". *Leathers*, 499 U.S. 439 at 449-50.

> In *Minneapolis Star* we struck down a tax * * * because the tax had the *effect* of singling out newspapers to shoulder its burden.

*Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986) (citations omitted) (emphasis added).[14] Governmental motive is irrelevant.

> *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."

*Leathers*, 499 U.S. at 445 (citing *Minneapolis Star*, 460 U.S. at 592); and see *Arkansas Writers'*, 481 U.S. at 228 ("Both types of discrimination can be established even where, as here, there is no evidence of improper censorial motive."). This approach is consistent with long-standing First Amendment principles.

> [A] statute challenged under the First Amendment "must be tested by its operation and effect."

*Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 709 (1986) (O'Connor, J., concurring) (quoting *Near v. Minnesota ex rel, Olson*, 283 U.S. 697, 708 (1931)); and see *Schneider v. State*, 308 U.S. 147, 161 (1939).

Discriminatory effect that violates the First Amendment should be held unconstitutional, whether the effect flows from legislated language or from the interpretation of legislated

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[14] Cf., *Cohen v. Cowles Media Co.*, ___ U.S. ___, 111 S.Ct. 2513 (1991) (allowed common law claim for promissory estoppel against newspaper because it was of "general applicability" even though it effectively burdened the press in a way it could not burden other businesses).

language. In fact, other than the distinction between discriminatory effect on the face of a statute and discriminatory effect through interpretation, the discrimination in *Minneapolis Star* was just like that here; some newspapers were taxed differently than others.[15]

Despite the authority of *Minneapolis Star*, the court below ignored discriminatory effect entirely, looking only at the face of the "tax scheme".

> The flaw in petitioner's argument is that, unlike the statutes in Minneapolis Star * * * and Arkansas Writers' * * * this tax scheme is not directed at the press in general or at a particular class of news entities.

Pet.App. A 5. The court disregarded the distinction between legislation and interpretation, stating that the "scheme" was not "directed at the press"; that is dubious in that the legislature that wrote the "scheme" cannot "direct" interpretation.[16] The court's use of the word "directed" also indicates that it ignored

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[15] The Court addressed both a tax and an exemption from that tax; it deemed each invalid. 460 U.S. 575. It held that the tax improperly "singled out the press"; actually, the tax on paper and ink bore on nothing but newspapers. 460 U.S. at 577-78. The particular discrimination identified was between all newspapers and the business community. 460 U.S. at 582-83. However, it also held that the exemption "target[ed] individual publications within the press". 460 U.S. at 592. That flaw is like the one asserted here, treating some newspapers differently than others.

[16] This is the same argument that Arkansas made, that its tax was "generally applicable" because it was "nominally imposed on receipts from sales of all tangible personal property"; this Court rejected that argument. *Arkansas Writers*, 481 U.S. at 229.

*Minneapolis Star* and *Arkansas Writers'* use of the word "direct"; that term was not defined by this Court to require affirmative or intentional conduct. The entire body of relevant First Amendment law prohibits discriminatory effect regardless of intent. However, by extracting a fragment from a controlling decision and disregarding the impact of its holding, the New York Court of Appeals came to an improper conclusion.

## II.
## A WRIT SHOULD ISSUE BECAUSE REVIEW WOULD ALLOW THIS COURT TO REVERSE A STATE COURT DECISION THAT CONFLICTS WITH DECISIONS OF THIS COURT BARRING DISCRIMINATORY TAXATION OF THE PRESS THAT IS NOT CONTENT NEUTRAL

Review would allow this Court to reverse a state court decision differentiating among categories of newspapers of different content. This Court has expressly barred such taxation among magazines.

> Indeed, this case involves a more disturbing use of selective taxation than *Minneapolis Star*, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*.

*Arkansas Writers'*, 481 U.S. at 229. The result condemned in *Arkansas Writers'* is strikingly similar to that here; the overt discrimination among members of one segment of the press was "particularly repugnant" because the lines were drawn between publications of different content. Here, the Free Circulation Press is taxed but the Paid Circulation Press is not, leaving these competitors on uneven ground. This discrimination is not content neutral.

The Free Circulation Press is inherently different than the Paid Circulation Press; the former traditionally focuses on local community news and events, and disseminates unorthodox opinions, while the latter concentrates on regional, national and international developments, and furthers more traditional views.[17] New York has legislated specifically to protect the diversity of ideas furthered by the Free Circulation Press. See New York Tax Law § 1115 (a) (20) (McKinney 1977) (exempting free circulation newspapers from tax on materials becoming a "physical component" of such papers) (Pet.App. A 56); and see New York Tax Law §§ 1115 (i) (B), (C) (McKinney 1987) (defining what is a free circulation newspaper) (Pet.App. A 58).

The discrimination here threatens more of the press' interest than that represented by the Papers. The basis of the unequal treatment is free circulation, making the interpretation applicable to all freely circulated material, including political newsletters. The precedent protecting handbills demonstrates

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17 "These weekly newspapers are an invaluable source of news and community information. Our own local Pennysaver recently published an extensive analysis of Islip Town's reassessment Program that is unmatched by those of conventional weekly publications." Legis. Bill Jacket, L. 1977, ch. 884, Letter from Assembly Member Paul Harenberg to Governor Hugh L. Carey (July 22, 1977). "The business of PENNYSAVER NEWS distribution is an important aspect to proper communications between elected officials in my area and the general public. * * * I have found that THE PENNYSAVER provides a unique community service that cannot be duplicated by daily or weekly newspapers, local radio stations, or even by our local cable TV." Legis. Bill Jacket, L. 1977, ch. 884, Letter from Assembly Member I. W. Bianchi to Governor Hugh L. Carey (July 20, 1977).

the grave nature of this threat. *Talley v. California*, 362 U.S. 60 (1960); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).[18] One of those decisions recognizes the particular problem where, as here, the appellant's injury demonstrates a broader danger.

> While it affects others, the Irvington ordinance * * * as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions.

*Schneider*, 308 U.S. at 163. This historic vigilance should be exercised here, where language that appears to apply to all businesses is interpreted to invidiously favor one kind of newspaper over another of inherently different content.

## III.
## A WRIT SHOULD ISSUE BECAUSE REVIEW WOULD ALLOW THIS COURT TO HARMONIZE THREE ASPECTS OF ITS DECISIONS DEFINING INVALID DISCRIMINATORY TAXATION OF THE PRESS

Review would provide the opportunity to harmonize three inconsistencies in the precedent respecting discriminatory taxation of the press.

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[18] It has been asserted that any discrimination respecting content is void, except within special categories such as obscenity; the argument is that such conduct is void and should not be tested at all. *Simon & Schuster v. New York State Crime Victims Bd.*, ___ U.S. ___, ___, 112 S.Ct. 501, 512-13 (1991) (Kennedy, J., concurring).

### A. *Minneapolis Star* Struck a Tax that Affected Only One Segment of the Press While *Leathers* Allowed a Tax that Affected Only One Segment of the Press

One inconsistency arises from the analysis in *Minneapolis Star*, 460 U.S. 575. The tax at issue was imposed on the use of paper and ink, and applied only to newspapers;[19] there was also an exemption for the first $100,000 of these commodities, which limited the effect of the tax to a few newspapers. 460 U.S. at 577-78. Both the tax and the exemption were deemed improper, for different reasons. See footnote 15, *supra* at p. 15.

Notably, the appellant newspaper's principal concern was discrimination against one segment of the press, newspapers.[20] Despite this, the Court's first stated reason for striking down the tax was that the state had "singled out the press for special treatment." 460 U.S. at 582. This was not accurate; the tax had "singled out" newspapers, a segment of the press. Eight years later this Court decided *Leathers* and held that the subject tax was not invalid simply because it affected only one "segment" of the press, cable television. 499 U.S. at 447-48. That was one of the precise evils of the tax stricken in

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19 It is not clear from the decision why a tax on "paper" did not involve magazines, but they are not discussed.

20 Comment, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue: Differential Taxation of the Press Violated the First Amendment*, 69 IOWA L. REV. 1103, 1114-15 (1984) ("Discriminatory treatment among newspapers was Star Tribune's major concern in this case and is the primary issue determined by the state supreme court.") (citing 314 N.W.2d 201, 202).

*Minneapolis Star*.[21] The results conflict.

State courts must guess at what is the law.[22] Prior to the *Leathers* decision, a New York court followed *Minneapolis Star* and now finds itself contradicting *Leathers*, which feigns accordance with *Minneapolis Star*. *McGraw-Hill, Inc. v. New York State Tax Comm'n*, 146 A.D.2d 371 (3rd Dep't 1989), *aff'd*, 75 N.Y.2d 852 (1990). The issue in *McGraw-Hill, Inc.* was whether all magazines could be treated differently than the broadcast media respecting "allocation" of sales tax paid on matter sold out of state. The New York court stated that:

> [the taxpayer] is correct in its contention that the difference in treatment between the print and broadcast media * * * violates the 1st Amendment guarantee of freedom of the press. A tax that singles out the press for differential treatment is "presumptively unconstitutional" * * *

*McGraw-Hill, Inc.*, 146 A.D.2d at 375 (citing *Minneapolis Star*,

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[21] The other evil addressed in *Minneapolis Star* was the exemption, limiting the effect of the tax to a few newspapers. If this had been the only basis, it might have been consistent with *Leathers*. However, it would then conflict with *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186 (1946) (upheld regulations treating some newspapers differently than others). Those cases might be distinguished because they did not involve taxes. See *Leathers*, 499 U.S. at 452.

[22] A constitutional scholar who had argued this issue before this Court interpreted *Minneapolis Star* as barring "taxation [of] a sub-set of the press." Tofel, J. TAXATION p. 42 (July 1990). He predicted, prior to the determination of *Leathers*, that taxing one segment of the press would be unconstitutional. *Id*. The fact that *Leathers* proved him wrong demonstrates the widespread confusion in this area.

460 U.S. at 585, and *Arkansas Writers'*, 481 U.S. at 229).[23] It struck down a tax on all magazines - an entire segment of the press. This decision was consistent with *Minneapolis Star* but is now inconsistent with *Leathers*, even though *Leathers* suggests that it is fully consistent with *Minneapolis Star*.

The Massachusetts Supreme Judicial Court struck "a tax scheme which subjects newspaper publishers to different tax treatment from other manufacturers." *Globe Newspaper Co. v. Comm'r of Rev.*, 571 N.E.2d 617, 620 (Sup.Ct.Mass. 1991) Again, newspapers were not the entire "press". More importantly, that court struck down precisely what had then been just recently allowed in *Leathers*.

### B. *Leathers* is Supported by Authority Protecting "Speakers" Rather than the "Press", Leaving Doubt as to Whether Those Distinct First Amendment Values Will be Treated the Same

Only in *Leathers* has this Court upheld a challenged tax on the press. In doing so, the Court stated that *Minneapolis Star* and *Arkansas Writers'* had addressed "differential taxation of First Amendment speakers"; it referred to "speakers" rather than the press. *Leathers*, 499 U.S. at 447. Furthermore, after holding that the subject tax did not fall into any of the existing categories of improper discriminatory taxes, the Court found no "additional basis" for discrimination (see footnote 13, *supra* at p. 13); it rested on precedent respecting "speakers", not the press. 499 U.S. at 449-52 (citing *Regan v. Taxation with*

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[23] Again, magazines were no more the entire "press" than newspapers had been the entire "press" in *Minneapolis Star*.

*Representation of Washington*, 461 U.S. 540 (1983) (tax exemption for lobbyists) and *Cammarano v. United States*, 358 U.S. 498 (1959) (deductibility of donation for lobbying)). This was questionable support because the press is not merely an industry of "speakers", but instead, the unique "fourth estate", metering the three branches of government.

> The publishing business is, in short, the only organized private business that is given explicit constitutional protection. * * * It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. * * * If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. * * * By including both guarantees in the First Amendment, the Founders quite clearly recognized the distinction between the two.

Stewart, *"Or of the Press"*, 26 HASTINGS L. J. 631, 633-34 (1975). This interest is public freedom, unlike the individual liberty of a "speaker". As Justice Marshall recognized, the press is a commercial enterprise, and can be silenced through manipulation of market forces.

> Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness.

*Leathers*, 499 U.S. at 465 (Marshall, J., dissenting).

The decisions respecting "speakers" cited in *Leathers* are inconsistent with the bedrock legal principles underpinning *Minneapolis Star* and *Arkansas Writers'*. While this part of

*Leathers* bore only on the "additional basis" for finding improper discrimination, the entire body of law is undermined.

### C. All Three Decisions Reject the Requirement of Censorial Intent but Use Contrary Language Connoting Intent

The third inconsistency is that, on the one hand, this Court has refused to let taxes stand because of their unequal effect, without evidence that the legislating bodies intended to suppress ideas, but, on the other hand, it has used language suggesting that intent plays a role.

> Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers.

*Minneapolis Star*, 460 U.S. at 591. "Singles out" and "targets" connote intent. The decision in *Arkansas Writers'* used the same two expressions. 481 U.S. at 228.

In *Leathers* the Court upheld a tax, in part, because it found no "purposeful attempt" to discriminate. *Leathers*, 499 U.S. at 448. The Court actually looked for evidence of intent to discriminate. It also inquired whether intent existed in connection with the "additional basis".

> Petitioners argue that * * * intermedia and intramedia discrimination, even in the absence of *intent to suppress speech* or of any effect on the expression of particular ideas, violates the First Amendment. Our cases do not support such a rule.

499 U.S. at 449-50 (emphasis added). However, the Court stated, in the same decision, that motive was not an issue.

> *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order

> to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."

*Leathers*, 499 U.S. at 445 (citing *Minneapolis Star*, 460 U.S. 575, 592); and see *Simon & Schuster v. New York State Crime Victims Bd.*, ___ U.S. ___, ___, 112 S.Ct. 501, 509 (1991). This conflict muddles the role of governmental intent, particularly because the result in *Leathers* is contrary to that in *Minneapolis Star*.

### D. These Inconsistencies Cloud Precedent that has been Misapplied by the State Courts

The critical precedent has been misapplied in the state courts.[24] The Connecticut Supreme Court improperly relied on the absence of legislative intent to uphold a tax discriminating through interpretation. *Gallacher v. Comm'r of Rev. Serv.*, 602 A.2d 996 (Sup.Ct.Conn. 1992).

> There is no indication that Connecticut has targeted the media or publications such as the plaintiffs' in a purposeful attempt to interfere with their first amendment activities.

*Gallacher*, 602 A.2d at 1003-04. That court also found that the subject publication was not a newspaper; however, it never considered whether it was part of the press.

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[24] State courts have generally not acknowledged the "additional basis" referred to in *Leathers*. *Emmis Publ. Corp. v. Indiana Dep't of State Rev.*, 612 N.E.2d 614 (TaxCt.Ind. 1993); *Magazine Publ. of Am. v. Commonwealth of Penn.*, 618 A.2d 1056 (Commw.Ct.Pa. 1992); *Globe Newspaper Co. v. Comm'r of Rev.*, 571 N.E.2d 617 (Sup.Ct.Mass. 1991). Cf., *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 410 S.E.2d 652, 655 (Sup.Ct.Va. 1991). In addition, at least one court has sidestepped the issue of content in order to invoke the Establishment Clause. *Thayer v. South Carolina Tax Comm'n*, 413 S.E.2d 810, 813 (Sup.Ct.S.C. 1992).

> In Connecticut all forms of written media are free to exercise their first amendment privileges without interference. The legislature, however, has chosen to favor only newspapers with a sales tax exemption. As long as the legislature had a legitimate noncontent reason for doing so, *the first amendment rights of other publications* are not violated.

*Gallacher*, 602 A.2d at 1004 (emphasis added). The court did not consider the public's right to a free press, but only the general first amendment rights of "other publications".

Another troubling case rejected the *Minneapolis Star* precedent and followed the principle of *Leathers* - before *Leathers* was decided. *Hearst Corp. v. Iowa Dep't of Rev. and Fin.*, 461 N.W.2d 295 (Sup.Ct.Iowa 1990), *cert. denied*, 499 U.S. 983 (1991). There the court answered in the affirmative the question of whether magazines could be taxed when newspapers were exempt.

A California court disregarded this Court's authority when reviewing a utility tax that covered cable television, but no other segment of the press; rather than merely following the *Leathers* decision, it cited state court authority holding that:

> perfection in a taxing scheme has never been a prerequisite to validity. Equal taxation of all is not the constitutional mandate but equal taxation of those "similarly situated".

*Sacramento Cable Television v. Sacramento*, 286 Cal.Rptr. 470, 477 (Dist.Ct.App. 1991) (citing *Times Mirror Co. v. City of Los Angeles*, 237 Cal.Rptr. 346, 351 (Dist.Ct.App. 1987), *appeal dismissed*, 484 U.S. 1022 (1988)). Being "similarly situated" has nothing to do with this Court's doctrine.

These inconsistent applications of precedent raise the question of how tightly the Court must rein government respecting potential future interference with the First Amendment. It has been argued that potential threats to the press should be left alone until they ripen. *Minneapolis Star*, 460 U.S. at 601 (Rehnquist, J. dissenting) (found the effect of the state's entire tax scheme, rather than simply the tax at issue, to be beneficial).[25] The majority position has found, to the contrary, that broader holdings preclude repeat offenses and give the press proper protection. 460 U.S. at 588-89. Of course, the entire discussion presumes that precedent is clear enough to be followed by those trying to do so. The minority view ignores how often this Court has had to revisit issues already resolved in order to debunk meaningless distinctions employed to avoid unpopular or undesired results.[26] A dramatic example is the segregation decisions following *Brown v. Board of Educ.* However, the First Amendment suffered a

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[25] The majority in *Minneapolis Star* examined the tax on paper and ink and the exemption that limited the effect to a few newspapers. 460 U.S. 575. Justice Rehnquist took a step back and examined the State's entire sales and use tax scheme; he noted that the complaining newspapers were actually favored considering that the burden of taxes not applied to newspapers would have been greater than the ones to which they were subject. 460 U.S. at 602-03 (Rehnquist, J., dissenting). However, the complaining newspapers still had to pay more than exempt newspapers. The majority did not rest on this, but held that unequal treatment is barred even if it favors the press. 460 U.S. at 588.

[26] The Court recognized this threat in *Minneapolis Star*, 460 U.S. at 589, n. 11.

similar redundant attack.

> The city contends that its power over its streets is not limited to the making of reasonable regulations * * * This same argument, made in reliance upon the same decision, has been directly rejected by this Court. * * * ¶In *Schneider v. [State], supra*, we held that the city of Irvington might not forbid conduct almost precisely the same as that with which the appellants in the instant case is charged.

*Jamison v. Texas*, 318 U.S. 413, 415-16 (1943).

If the Court's role includes the refinement of federal constitutional law, it must leave a map that is more easily followed than that respecting taxation of the press. Review will allow it to do so.

## IV.
## A WRIT SHOULD ISSUE BECAUSE REVIEW WOULD ALLOW THIS COURT TO CLARIFY THE ACKNOWLEDGED RELATIONSHIP BETWEEN FREEDOM OF THE PRESS AND EQUAL PROTECTION IN ANALYZING DISCRIMINATORY TAXATION AMONG MEMBERS OF ONE SEGMENT OF THE PRESS

Review would provide the opportunity to clarify the acknowledged relationship between the right to a free press and the right to equal protection. See *Arkansas Writers*, 481 U.S. at 227, n. 3; and see *Minneapolis Star*, 460 U.S. at 585, n. 7. Throughout the evolution of the discriminatory tax doctrine, justices have opined that unequal treatment of the press does not rise to the level of a First Amendment issue, but may be resolved as any other issue of equal protection. *Minneapolis Star*, 460 U.S. at 596 (Rehnquist, J., dissenting); *Arkansas Writers'*, 481 U.S. at 235 (Scalia, J., dissenting). One view is

that withholding an exemption is not regulation and poses no threat to a free press. *Arkansas Writers'*, 481 U.S. at 236. Another view is that the press is only at risk when discrimination results in calculable harm that threatens particular ideas. *Minneapolis Star*, 460 U.S. at 597. Either view would result in the search for a "rational relationship" to a "legitimate" governmental interest.

Arguably, the interpretation of the definition of a "sale" and, therefore, the entitlement to the Manufacturing Exemptions at issue, does not meet even this scant standard. See e.g., *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 410 S.E.2d 652, 656 (Sup.Ct.Va. 1991) (held that cable television operator stated equal protection claim respecting tax not applied to satellite operator). While the raising of revenue is plainly "legitimate", this discriminatory interpretation is not rational because it is so simple to tax evenhandedly. Even Justice Scalia's dissent in *Arkansas Writers'* suggests that the mere raising of revenue is not enough to support discriminatory taxation of the press; he did not rely on that asserted interest, but instead, latched onto the:

> legitimate goals of encouraging small publishers with limited audiences and advertising revenues (a category which in the State's judgment includes most publishers of religious, professional, trade, and sports magazines) and of avoiding the collection of taxes where administrative cost exceeds tax proceeds.

481 U.S. at 235-36 (Scalia, J., dissenting). Interestingly, the word "press" does not appear in the opinion. However, if the raising of revenue had been enough to support the tax, Justice Scalia would, presumably, have referred to it.

The discussion above highlights the relationship between First Amendment and Fourteenth Amendment issues. The fact that discrimination is unequal treatment triggers consideration of equal protection. However, applying the "rationality" test raises the question of whether that which is reasonably equal in other contexts is ever equal enough for the First Amendment. Arguably, no discrimination against or among the press can be justified by the interest of raising revenue. The free press is too important to be handled with the blunt instrument of the rational relationship test; it must be measured with more "sensitive tools". *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

## CONCLUSION

This Court should issue a writ of certiorari to review the challenged decision of the New York Court of Appeals.

Respectfully submitted,

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Farmingdale, New York 11735
(516) 753-9037
*Counsel of Record and*
*Attorney for Petitioner*

March 9, 1994

# Appendix A

## Decision of the New York Court of Appeals, dated May 6, 1993

New York Court of Appeals

Motion for leave to appeal denied upon the ground that an appeal lies as of right.

81 N.Y.2d 993 (1993).

Appendix B

Decision of the
New York Court of Appeals,
dated December 15, 1993

DECISION December 15, 1993

3 No. 257
In the Matter of Stanley Henry, individually & c.,

Appellant,

v.

James W. Wetzler, as Commissioner of the New York State Department of Taxation and Finance, et al.,

Respondents.

Judgment affirmed, with costs, in a memorandum.

Chief Judge Kaye and Judges Simons, Titone Hancock, Bellacosa Smith and Levine concur.

Appendix C

Memorandum Opinion of the
New York Court of Appeals,
dated December 15, 1993

STATE OF NEW YORK
COURT OF APPEALS

3 No. 257

In the Matter of Stanley Henry, Individually &c.,
Appellant,

v.

James W. Wetzler, as Commissioner of the New York State Department of Taxation and Finance, et al.,
Respondents.

MEMORANDUM

Thomas P. Schulz, for appellant.
Julie S. Mereson, for respondents.

MEMORANDUM:

The judgment of the Appellate Division should be affirmed, with costs.

Petitioner, an officer of a company that owns, publishes and distributes several "pennysaver" newspapers, commenced this article 78 proceeding to challenge a determination of the Tax Commission requiring payment of sales and use taxes due on certain purchases of equipment and electricity by the company that occurred between 1982 and 1985 (see, Tax Law §§ 1105[a], [2], and 1110). It is undisputed that the equipment and electrical power in question were used in the production of petitioner's newspapers, which carry paid advertisements and are distributed

to the public without charge.

Petitioner argued before the Tax Commission that the sale transactions in issue were free from taxation under Tax Law § 1115(a)(12), which exempts from sales and use tax certain equipment that is used "directly and predominantly in the production of tangible personal property * * * for sale" (see also, id., subd [c]). The Tax Appeals Tribunal rejected this argument, stressing that petitioner's newspapers are not themselves sold and that the payments petitioner's company receives from advertisers are for the advertising services it provides and not for the newspapers themselves. The Appellate Division confirmed this determination, expressly rejecting petitioner's claim that the statutory exemption was available in his circumstances and noting that his other claims were "either meritless or not properly before th[e] court due to petitioner's failure to raise them at the administrative level" (183 AD2d 57, 61).

On this appeal taken by petitioner as of right (see, CPLR 5601[b][1]), we conclude that respondent's determination regarding petitioner's entitlement to the Tax Law § 1115(a)(12) and (c) exemption was not only rational, but was the most reasonable view of the statute. A "sale" is defined as "[a]ny transfer of title or possession or both * * * in any manner or by any means whatsoever for a consideration" (id., § 1101[b][5]; see also, 20 NYCRR § 526.7[a][1]). The revenues petitioner's company received from advertisers were not consideration offered in exchange for the "transfer of title or possession" of

the newspapers that the equipment and electricity were used to produce. Thus, it cannot be said that the equipment and electricity was used for the production of tangible personal property that was manufactured "for sale."

We also reject petitioner's argument that respondent's construction of the statute brings it into conflict with First Amendment principles by singling out "pennysaver" shopping newspapers such as petitioner's for unfavorable tax treatment while other news entities are afforded an exemption. The flaw in petitioner's argument is that, unlike the statutes in Minneapolis Star & Tribune v Minnesota Commr. of Revenue (460 US 575) and Arkansas Writers' Project, Inc. v Ragland (481 US 221; see also, Leather v Medlock, __ US __, 111 S Ct 1438), this tax scheme is not directed at the press in general or at a particular class of news entities. Rather, it is a set of "generally applicable economic regulations" designed to ensure that the incidence of the tax falls only on the last transaction in the production chain (Minneapolis Star & Tribune v Minnesota Commr. of Revenue, supra, p 581). Under the statutory scheme, the exemption is denied to any business that does not produce a product "for sale." Its application to petitioner's business thus presents no "constitutional problems" (id.).

Petitioner's final contention that he should not have been assessed penalties and interest pursuant to Tax Law 1145 because his failure to pay the sales and use tax was not "willful" was not raised in his article 78 petition and is therefore not preserved for our review.

* * * * * * * * * * * * * * * * * * * * * * * *

Judgment affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Simons, Titone, Hancock, Bellacosa, Smith and Levine concur.

Decided December 15, 1993

Appendix D

Remittitur of the
New York Court of Appeals,
dated December 15, 1993

*Remittitur*

Court of Appeals
State of New York
The Hon. Judith S. Kaye, Chief Judge, Presiding

3 No. 257
In the Matter of Stanley
Henry, individually & c.,

Appellant,

v.

James W. Wetzler, as
Commissioner of the New
York State Department of
Taxation and Finance, et al.,
Respondents.

The appellant in the above entitled appeal appeared by Thomas P. Schulz, Esq.;
the respondents appeared by Hon. Robert Abrams, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Simons, Titone, Hancock, Bellacosa, Smith and Levine concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Appellate

Division, Third Department, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/S/

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 15, 1993

Appendix E

Opinion and Judgment of the
New York Supreme Court,
Appellate Division, Third Department,
decided and entered October 22, 1992

Supreme Court - Appellate Division
Third Judicial Department

CREW III,

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29

The essential facts have been stipulated. At all relevant times, petitioner was an officer of Chanry Communications, Ltd which owns, publishes and distributes 17 separate free-circulation "pennysaver" newspapers throughout the Long Island region. Chanry is in the business of soliciting and receiving advertisements from various advertisers which, in turn, require that their ads appear in the pennysavers and that the pennysavers be distributed within specific geographic areas. The advertisers dictate the specific type and format of the ad placed in the pennysaver, and the rates charged by Chanry are based upon the size of the ad and the geographic area in which it is circulated. The pennysavers are printed and published by Chanry and then distributed, pursuant to an implied contract between Chanry and the advertisers, to the public free of charge. The distribution of the pennysavers by Chanry to the general public is not subject to

sales or use tax. In addition to the paid advertisements, the pennysavers contain, *inter alia*, news and feature stories, editorials and reader polls over which Chanry maintains complete editorial control.

Between 1982 and 1985, Chanry purchased approximately $1 million in machinery and equipment for use "directly and predominantly" in the production of the pennysavers. Following an audit for the period October 1, 1982 through February 28, 1985, the Department of Taxation and Finance issued notices of determination and demand for payment of sales and use taxes due in the amount of $246,719.59, plus interest and penalties, to petitioner and Chanry.[1] In so doing, the Department disallowed a manufacturing exemption claimed by petitioner under Tax Law § 1115 (a) (12), which exempts from sales and use taxes certain machinery or equipment used or consumed "directly and predominantly in the production of tangible personal property * * * *for sale*" (emphasis supplied).

The parties consented to having the controversy determined on submissions, without a hearing, and the matter was placed before an Administrative Law Judge (hereinafter ALJ) of the Division of Tax Appeals. The ALJ determined that petitioner was not entitled to the claimed manufacturing exemption under Tax Law § 1115 (a) (12), nor was petitioner entitled to the benefit of Tax Law § 1115 (c), which exempts from sales tax,

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[1] Although petitioner contests these determinations, the amount of the tax is not in dispute.

*inter alia*, electricity used or consumed "directly and exclusively in the production of tangible personal property * * * *for sale*" (emphasis supplied). Petitioner filed a notice of exception. Following oral argument respondent Tax Appeals Tribunal, *inter alia*, denied petitioner's exception and sustained the ALJ's determination and notices of determination. Petitioner thereafter commenced this CPLR article 78 proceeding to review the Tribunal's determination.

"It is well settled that statutes creating tax exemptions are to be strictly construed and it is the taxpayer's burden to demonstrate that its interpretation of the law is the only reasonable one * * *" (*Matter of Scotsmen Press v. State of New York Tax Appeals Tribunal*, 165 AD2d 630, 633, 569 N.Y.S.2d 991 [citation omitted]; *see, Matter of Dental Socy. of State of N.Y v. New York State Tax Commn.*, 148 AD2d (sic) 791, 792-793, 538 N.Y.S.2d 374). Briefly, Tax Law § 1105(a) imposes sales tax upon "receipts from every retail sale of tangible personal property, except as otherwise provided in [Tax Law article 28]"; a similar tax is imposed upon the receipts from every sale of, *inter alia*, electricity in accordance with Tax Law § 1105(b). In addition, Tax Law § 1110 imposes a compensating use tax upon tangible personal property. Tax Law § 1115 exempts from the taxes imposed by Tax Law §§ 1105 and 1110, *inter alia*, "[r]eceipts from * * * [m]achinery or equipment for use of consumption directly and predominantly in the production of tangible personal property * * * for sale" (Tax Law § 1115 [a] [12]) and "electricity * * * for use or

consumption directly and exclusively in the production of tangible personal property * * * for sale" (Tax Law § 1115[c]) "Sale", in turn, is defined as "[a]ny transfer of title or possession or both * * * in any manner or by any means whatsoever for a consideration" (Tax Law § 1101 [b] [5]) Respondent Commissioner of Taxation and Finance has stipulated that the pennysavers constitute "tangible personal property" and, further, that the machinery and equipment purchased by Chanry during the audit period was "for use directly and predominantly in the production of the pennysavers" [2] Thus, petitioner's entitlement to the exemption turns on whether the pennysavers are tangible personal property for sale within the meaning of Tax Law § 1115 (a) (12) and § 1115 (c).

Petitioner contends that the required transfer of title or possession for consideration may be found either in the "sale" or the pennysavers by Chanry to its customers, i.e., the advertisers, followed by Chanry's distribution of the pennysavers on behalf of the advertisers to the general public in specifically designated communities or, alternatively, in the "sale" of the pennysavers, which has been subsidized by Chanry's advertisers, to the general public. Under the first scenario, petitioner asserts that an actual and/or constructive transfer may be found in the delivery of the pennysavers to populations designated by the

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[2] Although not included in the stipulation, the Commissioner does not appear to contest that the electricity was also for use or consumption "directly and exclusively" in the production of the pennysavers.

advertisers and, further, that the payment of advertising fees by the advertisers to Chanry provides the required consideration. Under the alternative approach, the transfer would purportedly occur upon the "subsidized" delivery of the pennysavers by Chanry to the general public.

The Tribunal rejected petitioner's arguments based upon its finding that the advertisers were not buying the pennysaver but, rather, were purchasing Chanry's services in preparing an advertisement and arranging for its distribution through the pennysavers. This finding was based, in part, upon the nature of the fees paid by the advertisers which, as noted previously, were determined by the size of the ad and the particular distribution zone. The Tribunal concluded that because the advertisers' only interest in the pennysavers was that it contain ads of an agreed-upon size and content, any consideration paid by the advertisers was not for the sale of the pennysavers but, rather, for Chanry's advertising services. This determination is fully supported by the record. Although petitioner has offered alternative interpretations of Tax Law § 1115 (a) (12) and 1115 (c), he has not met his burden of establishing that such interpretations are the only reasonable ones (*see, Matter of Dental Socy. of State of N.Y. v. New York State Tax Commn.*, 148 A.D.2d 791, 792-793, 538 N.Y.S.2d 374, *supra*). To the extent that petitioner specifically challenges the Tribunal's finding that "Chanry's activities consisted of advertising services of which the [pennysavers] were a part", we are of the view that the record as a whole, particularly the facts as stipulated by the

parties, fully supports this determination.

Finally, we reject petitioner's contention that certain amendments to Tax Law § 1115 (L. 1977, ch. 884) provide support for the claim that the transaction between Chanry and its advertisers constituted a sale. The Tribunal's interpretation of the relevant statutory provisions (*see*, Tax Law § 1115 [i] [A] [sale of shopping paper to publisher exempt]; *see also*, Tax Law § 1101 [b] [4] [i] [resale/component parts]; § 1105 [c] [1] [newspaper exemption]) is rational and, hence, is entitled to deference (*see generally, Matter of 172 E. 122 St. Tenants Assn. v. Schwarz*, 73 N.Y.2d 340, 348, 540 N.Y.S.2d 420, 537 N.E.2d 1281; *Matter of Schwartz v. Crosson*, 165 A.D.2d 147, 150, 566 N.Y.S.2d 679). Petitioner's remaining arguments have been considered and rejected as either meritless or not properly before this court due to petitioner's failure to raise them at the administrative level (*see generally, Matter of Scotsmen Press v. State of New York Tax Appeals Tribunal*, 165 A.D.2d 630, 634, 569 N.Y.S.2d 991, *supra*).

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

WEISS, P.J., MIKOLL, YESAWICH Jr. and MERCURE, J.J., CONCUR.

Appendix F

Order of the New York Supreme Court
Appellate Division, Third Department,
decided and entered December 15, 1992

Supreme Court - Appellate Division
Third Department

63859 - In the Matter of STANLEY HENRY,
Individually and on Behalf of
CHANRY COMMUNICATIONS LTD.,
Petitioner,

v

JAMES W. WETZLER, as
Commissioner of the New York
State Department of Taxation
and Finance, et al.,
Respondents.

Motion for clarification of decision dated October 22, 1992 and for permission to appeal to the Court of Appeals denied, without costs.

WEISS, P.J., MIKOLL, YESAWICH JR., MERCURE and CREW III, JJ., concur.

Appendix G

Determination of the New York
Department of Taxation and Finance,
Division of Tax Appeals, dated April 12, 1990

STATE OF NEW YORK
DIVISION OF TAX APPEALS
In the Matter of the Petition

of

CHANRY COMMUNICATIONS, LTD.

For Revision of a Determination or for
Refund of Sales and Use Taxes Under
Articles 28 and 29 of the Tax Law for
the Period October 1, 1982 through
February 28, 1985
In the Matter of the Petition

of

STANLEY HENRY, AS OFFICER

For Revision of a Determination
or for Refund of Sales and Use
Taxes under Articles 28 and 29
of the Tax Law for the Period
October 1, 1982 through
February 28, 1985

Petitioners, Chanry Communications, Ltd., 425 Smith Street, Farmingdale, New York 11735, and Stanley Henry, as officer, 318 Southdown Road, Lloyd Harbor, New York 11743, filed petitions for revision of determinations or for refund of

sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1982 through February 28, 1985 (File Nos. 806108 and 806109).

On April 28, 1989 and May 3, 1989, respectively, petitioners by their representative, Rivkin, Radler, Dunne & Bayh (Lawrence M. Hill, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel) executed a consent to have the controversy determined on submission without hearing, with all documents and briefs to be submitted by September 21, 1989. After due consideration of the record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner Chanry Communications, Ltd. is entitled to an exemption from sales and use taxes with respect to machinery and equipment used in the production of shopping papers or pennysavers.

FINDINGS OF FACT

Petitioners, Chanry Communications, Ltd. and Stanley Henry, and the Division of Taxation entered into a stipulation of facts which has been adopted as Findings of Fact "1" through "5", "8", "10" through "16", "18", "19", "21" and "23" through "27". The stipulation is supplemented by Findings of Fact "6", "7", "9", "17", "20" and "22".

1. On July 10, 1987, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Chanry Communications, Ltd.

("Chanry") spanning the period October 1, 1982 through February 28, 1985 and assessing a sales and use tax liability in the aggregate amount of $246,719.59, plus penalties (Tax Law § 1145[a][1]) and interest. On the same date, the Division of Taxation issued an additional notice of determination and demand for payment of sales and use taxes due spanning the same period and assessing the same amounts as above, against petitioner Stanley Henry as a person required to collect and remit taxes on behalf of Chanry. These two notices were based upon the results of a field audit of the business operations of Chanry as described hereinafter.

2. At the time of the filing of the petition in this case, on September 30, 1988, Chanry was a corporation residing at 425 Smith Street, Farmingdale, New York 11735. At all relevant times, Chanry was doing business in the State of New York.

3. Chanry owns, publishes and distributes 17 separate free-circulation pennysaver newspapers or shopping papers ("shopping papers") throughout the Long Island region. The shopping papers are circulated in specifically designated geographic areas.

4. The shopping papers constitute tangible personal property.

5. Chanry is in the business of soliciting and receiving advertisements from various advertisers. The advertisers require that these advertisements be placed in the shopping papers and that the shopping papers be distributed within specific geographic areas designated by the advertisers. The advertisers

also choose, inter alia, the type of advertisement that is placed in the publication, its style and location in the format of the shopping paper, and its length and publication date(s).

6. The advertising order between the advertiser and Chanry indicates that a purchaser of advertising is not guaranteed a particular position within the shopping paper; that the art and make-up prepared by Chanry remain the property of petitioner; that only upon purchasing the art and make-up does the advertisement become the property of the advertiser; and that Chanry's liability for an error will not exceed the cost of the space occupied by the advertisement.

7. The rebate agreement between the advertiser and Chanry indicates that any rebate paid by Chanry can be reinvested in additional advertising; that the rebate will be paid only if all prior advertisements have been paid in full; and that the advertiser shall pay for the advertisements at prevailing rates at the time the advertisement appears.

8. The advertising rates which Chanry charges are dependent upon the geographic area in which the particular publication is to be distributed.

9. Chanry did not charge the advertisers sales tax on their purchases of advertisements.

10. Chanry prints and publishes the shopping papers and then distributes them to the public, free of any charge to them, in the specific geographic area designated by the advertiser. The distribution of these shopping papers is not subject to sales or use tax.

11. The purchasers of advertising in Chanry's publications understand that the publications are to be distributed by Chanry, free or charge, to the ultimate readers. Chanry has an implied contract to distribute the publication to the reading public.

12. Despite the advertisers' ability to designate the geographic areas in which they choose to advertise, Chanry retains complete editorial control regarding news and feature content.

13. As between Chanry and its advertisers, it is expressly understood that Chanry, using its own machinery, equipment and supplies, will produce, print and publish the shopping papers as well as distribute them. In exchange for the advertising and delivery of the published shopping paper to the public, the advertisers pay Chanry a fee.

14. Advertising revenues of the shopping papers support the operations and are in lieu of other charges that would otherwise be necessary to support the operations.

15. Notwithstanding Chanry's description as a shopping paper, its publications include news and feature stores, reader polls, editorials, photographs and reader correspondence.

16. Between 1982 and 1985, Chanry purchased approximately $1 million in machinery and equipment for use directly and predominantly in the production of the pennysavers or shopping papers.

17. Chanry's machinery and equipment is used less than 5% of operating time in producing items other than shopping papers.

18. The purchase by Chanry of paper, ink and printing supplies is not subject to sales tax.

19. On or about September 11, 1984, the Division of Taxation commenced an audit of petitioners' books and records for the period at issue. The audit followed generally accepted procedures and tests consistent with the nature of the business operation and in accordance with the Tax Law.

20. The auditor analyzed in detail the fixed asset account and discovered that no tax had been paid by petitioners on purchases of machinery and equipment in the amount of $2,029,813.22. Use tax due on these purchases was assessed in the amount of $150,593.54. The auditor next reviewed an account entitled "intangible assets" which consisted of items such as "newspaper morgues" (dead issue files) and libraries of customer insertions. As petitioners had not paid any tax on these purchases of 325,100.00, the auditor assessed use tax of $26,820.75. The auditor also assessed use tax in the amount of $25,040.23 on lease payments for machinery and equipment in the amount of $314,267.51. Chanry's asset account revealed sales of assets in the amount of $152,618.00 on which no tax was paid. Therefore, the auditor assessed sales tax in the amount of $12,490.74. Finally, in reviewing recurring expenses, the auditor determined that petitioners had not paid sales tax on purchases of the bags used to deliver the shopping papers and on the electricity used to operate the building plant. The amount of purchases was $396,127.00 and use tax of $31,774.33 was assessed by the auditor. In summary, the total

amount of sales and use tax assessed is as follows:

| Use Tax | Amount Subject to Tax | Tax |
|---|---|---|
| Fixed Assets | $2,029,813.22 | $150,593.54 |
| Other Assets | 325,100.00 | 26,820.75 |
| Leases | 314,267.51 | 25,040.23 |
| Expenses | 396,127.00 | 31,774.33 |
| | $3,065,307.70 | $234,228.85 |
| Sales Tax | | |
| Sale of Assets | 152,618.00 | 12,490.74 |
| TOTAL | $3,217,945.70 | $246,719.59 |

21. The Division of Taxation determined that Chanry was not registered pursuant to Tax Law §§ 1132 and 1134 until 1986, and therefore could not issue exemption certificates to its suppliers of machinery and equipment.

22. The auditor assessed penalty due to the substantial underreporting of tax ($24,672.00 per quarter) and the failure of Chanry to register as a sales tax vendor with the Department of Taxation and Finance.

23. As a result of the audit, the Division of Taxation determined that petitioners owed additional use tax on purchases of machinery, equipment, supplies and materials as well as additional sales tax on unsubstantiated exempt sales.

24. The Division of Taxation disallowed a manufacturing exemption claimed by petitioners under Tax Law § 1115(a)(12) on the purchase of certain machinery and equipment used in the production of shopping papers.

25. Although the determinations of the Division of Taxation are wholly in dispute, the amount of the tax is not in dispute.

## SUMMARY OF THE PARTIES' POSITIONS

26. Petitioners argue that the distribution of shopping papers to the public constitutes a sale of tangible personal property. Since the advertisers pay the consideration to Chanry and Chanry transfers possession of the shopping papers to the advertisers' designee, i.e., the public, this constitutes a sale of tangible personal property.

27. The Division of Taxation argues that the printing or publishing of shopping papers for free distribution to the public does not constitute the manufacture of tangible personal property for sale within the purview of Tax Law § 1115(a)(12).

## CONCLUSIONS OF LAW

A. Tax Law § 1115(a)(12) exempts from the imposition of sales tax machinery or equipment used or consumed directly and predominantly in the production of tangible personal property, for sale, by manufacturing. Tax Law § 1115(c) exempts from the imposition of sales tax electricity used or consumed directly and exclusively in the production of tangible personal property, for sale, by manufacturing.

The term "sale" is defined by Tax Law § 1101(b)(5) and 20

NYCRR § 526.7(a)(1) as "any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration." As the parties have stipulated that the shopping papers constitute tangible personal property, the issue remaining is whether petitioners were involved in a "sale" of the shopping papers published, that is, whether the shopping papers were transferred for a consideration.

B. It should be noted that, as a general rule, statutory exemptions from tax are strictly construed against the party claiming the exemption. The burden is upon petitioners to clearly establish their right to the exemption provided by Tax Law § 1115(a)(12) (Matter of Grace v. State Tax Commission, 37 NY2d 193, 371 NYS2d 715). Petitioners contend that the advertisers provide the consideration for the purchase of the shopping papers through their payments for advertising and that the distribution of the shopping papers to the public constitutes the transfer of tangible personal property to the advertiser's designee. This contention is not supported by the facts in this matter.

There is nothing in the record to support a conclusion that the advertisers obtained title to or possession of the shopping papers for consideration. Nothing in the Advertising Order or Rebate Agreement between Chanry and the advertisers indicates that the advertisers paid for anything more than advertising space. The advertising rate is based upon the size of the advertisement and the geographic area where the shopping paper is to be distributed. Petitioners' liability for any error is limited

to the cost of the space occupied by the advertisement. The art and make-up prepared by petitioners remain the property of petitioners, and only upon purchasing the art and make-up does the advertisement become the property of the advertiser. Under these circumstances, it cannot be said that the payments by the advertisers constituted consideration for the purchase of tangible personal property. In fact, such payments were made solely in exchange for the advertising services performed by petitioners.

In addition, the public does not stand in the shoes of the advertisers as designees (cf. Matter of Savemart, Inc. v. State Tax Commission, 105 AD2d 1001, 482 NYS2d 150) in their receipt or use of the merchandise. The distribution of the shopping papers to the public is a part of the advertising service provided by petitioners. The public did not receive the shopping papers in the place of the advertisers. Instead, Chanry was obligated, under its implied contract, to distribute the shopping papers to the public as part of its advertising service. Furthermore, since the shopping papers were distributed free of charge to the public, the public cannot be considered as purchasers of tangible personal property.

Since the advertising space did not entitle the advertisers to title or exclusive possession of the shopping papers, and the public cannot be considered a designee of the advertisers or purchasers of tangible personal property, the transactions between the advertisers and Chanry cannot constitute a "sale". In the absence of a showing that the products produced by the machinery and equipment were sold to customers, Chanry has

not established that it is entitled to an exemption under Tax Law § 1115(a)(12) (Matter of Shanty Hollow Corporation v. State Tax Commission, 111 AD2d 968, lv denied 66 NY2d 603).

C. The rationale for the manufacturing exemption provided by Tax Law § 1115(a)(12) is the desire to avoid the pyramiding of sales tax. Because an item that is held for sale is generally subject to the imposition of sales tax, certain of the costs of producing that item, such as the machinery and equipment, were exempted from sales tax. However, in the present case, such rationale is inapplicable because the receipts from the retail sale of shopping papers to the publisher of such publication and the receipts from the sale of printing services performed in publishing a shopping paper are exempt from sales tax, and shopping papers are distributed to the public without consideration (see, Tax Law § 1115[i][A] and [B]).

In addition, under petitioners' interpretation, the sale of a shopping paper to the advertisers would be subject to the imposition of sales tax as a retail sale of tangible personal property, as the advertisers would no longer be considered purchasers of advertising, but of tangible personal property. (See, Tax Law § 1105[a].) Such an interpretation would be in direct conflict with the exemption provided by Tax Law § 1105(c)(1), which excludes advertising services from the imposition of sales tax. It is well established that inconsistency in the same statute is contrary to the intent of the Legislature, and must be avoided (Delaware County Elec. Coop., Inc. v. Power Authority of the State of New York, 96 AD2d 154, 468

NYS2d 233, affd 62 NY2d 877, 478 NYS2d 865). A statute must not be read so that one word or sentence will cancel and render meaningless another word of sentence (Albano v. Kirby, 36 NY2d 526, 369 NYS2d 655). Such a construction, resulting in the nullification of one part of a statute by another, is not permissible (Matter of Chase National Bank v. Guardian Realties, 283 NY 350; McKinney's Cons Laws of NY, Book 1, Statutes § 98). Furthermore, petitioners' interpretation is inconsistent with Chanry's own failure to collect sales tax from its advertisers.

Finally, the position of the Division of Taxation is consistent with the statutory scheme relating to shopping papers as created by the Laws of 1977 (ch 884, §§ 1, 2). Excluded from the imposition of sales tax are the receipts from the retail sale of shopping papers to the publishers, receipts from the sale of printing services performed in publishing shopping papers and receipts from the sale of paper, ink and other tangible personal property purchased for use in the publication of shopping papers. Conspicuously absent from the Tax Law is an exemption for the receipts from the retail sale of shopping papers, such being unnecessary as shopping papers, to qualify for the exemption, must be distributed to the public, without consideration (see Tax Law § 1115[i][B]). It is apparent that the Legislature intended that the public be the transferee of the shopping papers and that the advertisers not be the purchasers subject to sales tax.

D. Petitioners' reliance upon sales tax regulation 20 NYCRR 526.6(c)(4), its examples and the cases decided

thereunder is misplaced. The regulation, examples, and cases all involve transactions where consideration was provided and possession of the tangible personal property was transferred to the purchaser. For example, the regulation provides that:

> "Tangible personal property which is purchased and given away without charge, for promotion or advertising purposes is not purchased for resale. It is a retail sale to the purchaser thereof, and is not taxable to the recipient of the property. (Emphasis added.)

In Envirogas, Inc. v. Chu (114 AD2d 38, 497 NYS2d 503, affd 69 NY2d 632, 511 NYS2d 228) the court concluded that a taxable sale occurred where the lessor under a gas lease received "free gas" in exchange for granting the lessee unconditional and exclusive right to extract gas from lessor's property. In Matter of Balsam Amusements (State Tax Commission, September 28, 1983) merchandise was purchased and then given away as prizes in amusement games. In these and other cases cited by petitioners, the tangible personal property was transferred for consideration. Unlike those situations, the present case does not involve any consideration for the shopping papers, nor transfer of possession to the advertisers.

E. Dealing with petitioners' claim that the shopping papers constitute newspapers, it appears that Matter of G&B Publishing Co., Inc. v. Dept. of Taxation and Finance (57 AD2d 18, lv denied 42 NY2d 807) which involved a publication nearly identical to petitioners' publication, is dispositive of the issue. The Court held that the publication was not a newspaper. (See also, Matter of Geneva Pennysaver, Inc., Tax Appeals Tribunal, September 11, 1989.)

F. Chanry would not be entitled to the exemption were it determined that title or possession had passed to the advertisers. In such a situation, the test which the courts of New York have developed with respect to the exemptions at hand would apply. The machinery, equipment and fuel will not be considered as used in the production of tangible personal property "for sale" for purposes of the manufacturing exemption when the facts indicate that the product is being manufactured primarily for use in services provided by the producer (see, Matter of Midland Asphalt v. Chu, 136 AD2d 851, 523 NYS2d 697, lv denied 72 NY2d 806; Matter of Southern Tier Iron Works v. Tully, 66 AD2d 921, 410 NYS2d 711). Here, at least 95% of the machinery and equipment's use was devoted to the publication of shopping papers which were distributed free or charge to the public, as part of the advertising service provided by Chanry. Therefore, Chanry was manufacturing the shopping papers for its own use as part of its advertising service and was not primarily in the business of selling the shopping papers separately from the services which it provided (see, Matter of Midland Asphalt v. Chu, supra; Matter of Southern Tier IronWorks v. Tully, supra; Matter of Willets Point Contracting Corp., Tax Appeals Tribunal, September 14, 1989).

G. The petition of Chanry Communications, Inc. and Stanley Henry, as officer, are denied, and the notices of determination and demands for payment of sales and use taxes due dated July 10, 1987, together with such penalty and interest as is lawfully due and owing, are sustained.

DATED: Troy, New York
APR 12 1990

/S/
ADMINISTRATIVE LAW JUDGE

Appendix H

Decision of the New York
Tax Appeals Tribunal,
dated March 7, 1991

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

CHANRY COMMUNICATIONS, LTD.

For Revision of a Determination of for Refund of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for the Period October 1, 1982 through February 28, 1985.

In the Matter of the Petition

of

STANLEY HENRY, AS OFFICER

For Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period October 1, 1982 through February 28, 1985.

Petitioners Chanry Communications, Ltd., 425 Smith Street, Farmingdale, New York 11735 and Stanley Henry, as officer, 318 Southdown Road, Lloyd Harbor, New York 11743 filed an exception to the determination of the Administrative Law Judge

issued on April 12, 1990 with respect to their petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 1, 1982 through February 28, 1985 (File Nos. 806108 and 806109). Petitioners appeared by Rivkin, Radler, Bayh, Hart & Kremer (Robert L. Folks, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Petitioners and the Division filed briefs on exception. Oral argument, at the request of petitioners, was heard on September 26, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

Issue

Whether petitioner Chanry Communications, Ltd. is entitled to an exemption from sales and use taxes with respect to machinery, equipment and electricity used in the production of shopping papers.

Findings of Fact

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Petitioners, Chanry Communications, Ltd. and Stanley Henry, and the Division of Taxation entered into a stipulation of facts which was adopted as Findings of Fact numbered "1" through "5", "8", "10" through "16", "18", "19", "21" and

"23" through "27" in the Administrative Law Judge's determination. The stipulation was supplemented by Findings of Fact numbered "6", "7", "9", "17", "20" and "22" in the Administrative Law Judge's determination.

On July 10, 1987, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Chanry Communications, Ltd. ("Chanry") spanning the period October 1, 1982 through February 28, 1985 and assessing a sales and use tax liability in the aggregate amount of $246,719.59, plus penalties (Tax Law § 1145[a][1]) and interest. On the same date, the Division of Taxation issued an additional notice of determination and demand for payment of sales and use taxes due spanning the same period and assessing the same amounts as above, against petitioner Stanley Henry as a person required to collect and remit taxes on behalf of Chanry. These two notices were based upon the results of a field audit of the business operations of Chanry as described hereinafter.

At the time of the filing of the petition in this case, on September 30, 1988, Chanry was a corporation residing at 425 Smith Street, Farmingdale, New York 11735. At all relevant times, Chanry was doing business in the State of New York.

Chanry owns, publishes and distributes 17 separate free-circulation pennysaver newspapers or shopping papers ("shopping papers") throughout the Long Island region. The shopping papers are circulated in specifically designated geographic areas.

The shopping papers constitute tangible personal property.

Chanry is in the business of soliciting and receiving advertisements from various advertisers. The advertisers require that these advertisements be placed in the shopping papers and that the shopping papers be distributed within specific geographic areas designated by the advertisers. The advertisers also choose, inter alia, the type of advertisement that is placed in the publication, its style and location in the format of the shopping paper, and its length and publication date(s).

The advertising order between the advertiser and Chanry indicates that a purchaser of advertising is not guaranteed a particular position within the shopping paper; that the art and make-up prepared by Chanry remain the property of petitioner; that only upon purchasing the art and make-up does the advertisement become the property of the advertiser; and that Chanry's liability for an error will not exceed the cost of the space occupied by the advertisement.

The rebate agreement between the advertiser and Chanry indicates that any rebate paid by Chanry can be reinvested in additional advertising; that the rebate will be paid only if all prior advertisements have been paid in full; and that the advertiser shall pay for the advertisements at prevailing rates at the time the advertisement appears.

The advertising rates which Chanry charges are dependent upon the geographic area in which the particular publication is to be distributed.

Chanry did not charge the advertisers sales tax on their purchases of advertisements.

Chanry prints and publishes the shopping papers and then distributes them to the public, free of any charge to them, in the specific geographic area designed by the advertiser. The distribution of these shopping papers is not subject to sales or use tax.

The purchasers of advertising in Chanry's publications understand that the publications are to be distributed by Chanry, free of charge, to the ultimate readers. Chanry has an implied contract to distribute the publication to the reading public.

Despite the advertisers' ability to designate the geographic areas in which they choose to advertise, Chanry retains complete editorial control regarding news and feature content.

As between Chanry and its advertisers, it is expressly understood that Chanry, using its own machinery, equipment and supplies, will produce, print and publish the shopping papers as well as distribute them. In exchange for the advertising and delivery of the published shopping paper to the public, the advertisers pay Chanry a fee.

Advertising revenues of the shopping papers support the operations and are in lieu of other charges that would otherwise be necessary to support the operations.

Notwithstanding Chanry's description as a shopping paper, its publications include news and feature stories, reader polls, editorials, photographs and reader correspondence.

Between 1982 and 1985, Chanry purchased approximately

$1 million in machinery and equipment for use directly and predominantly in the production of the pennysavers or shopping papers.

Chanry's machinery and equipment is used less than 5% of operating time in producing items other than shopping papers.

The purchase by Chanry of paper, ink and printing supplies is not subject to sales tax.

On or about September 11, 1984, the Division of Taxation commenced an audit of petitioners' books and records for the period at issue. The audit followed generally accepted procedures and tests consistent with the nature of the business operation and in accordance with the Tax Law.

The auditor analyzed in detail the fixed asset account and discovered that no tax had been paid by petitioners on purchases of machinery and equipment in the amount of $2,029,813.22. Use tax due on these purchases was assessed in the amount of $150,593.54. The auditor next reviewed an account entitled "intangible assets" which consisted of items such as "newspaper morgues" (dead issue files) and libraries of customer insertions. As petitioners had not paid any tax on these purchases of $325,100.00, the auditor assessed use tax of $26,820.75. The auditor also assessed use tax in the amount of $25,040.23 on lease payments for machinery and equipment in the amount of $314,267.51. Chanry's asset account revealed sales of assets in the amount of $152,618.00 on which no tax was paid. Therefore, the auditor assessed sales tax in the amount of $12,490.74. Finally, in reviewing recurring expenses, the

auditor determined that petitioners had not paid sales tax on purchases of the bags used to deliver the shopping papers and on the electricity used to operate the publishing plant. The amount of purchases was $396,127.00 and use tax of $31,774.33 was assessed by the auditor. In summary, the total amount of sales and use tax assessed is as follows:

| Use Tax | Amount Subject to Tax | Tax |
|---|---|---|
| Fixed Assets | $2,029,813.22 | $150,593.54 |
| Other Assets | 325,100.00 | 26,820.75 |
| Leases | 314,267.51 | 25,040.23 |
| Expenses | 396,127.00 | 31,774.33 |
| | $3,065,307.70 | $234,228.85 |
| Sales Tax | | |
| Sale of Assets | 152,618.00 | 12,490.74 |
| TOTAL | $3,217,945.70 | $246,719.59 |

The Division of Taxation determined that Chanry was not registered pursuant to Tax Law §§ 1132 and 1134 until 1986, and therefore could not issue exemption certificates to its suppliers of machinery and equipment.

The auditor assessed penalty due to the substantial underreporting of tax ($24,672.00 per quarter) and the failure of Chanry to register as a sales tax vendor with the Department of Taxation and Finance.

As a result of the audit, the Division of Taxation determined that petitioners owed additional use tax on purchases of machinery, equipment, supplies and materials as well as additional sales tax on unsubstantiated exempt sales.

The Division of Taxation disallowed a manufacturing exemption claimed by petitioners under Tax Law § 1115(a)(12) on the purchase of certain machinery and equipment used in the production of shopping papers.

Although the determinations of the Division of Taxation are wholly in dispute, the amount of the tax is not in dispute.

We find the following additional facts:

> The machinery and equipment at issue here were used directly and predominantly in the production of tangible personal property and did not consist of parts with a useful life of one year or less.
>
> It was stipulated by the parties that Stanley Henry was an officer and/or employee of Chanry throughout the audit period.

Opinion

The Administrative Law Judge held that petitioner Chanry was not entitled to the exemptions provided by Tax Law § 1115(a)(12) and (c) for the machinery, equipment and electricity used by it in the production of shopping papers. The Administrative Law Judge found that the shopping papers were not "sold" within the meaning of Tax Law § 1101(b)(5) because there was no transfer of tangible personal property for consideration as required. Additionally, the Administrative Law Judge held that even if title or possession of the shopping papers passed to the advertisers resulting in a transfer of tangible

personal property, Chanry would not be entitled to the exemptions because the papers were being manufactured primarily for Chanry's own use in its advertising service business. Chanry's claim that its shopping papers were entitled to the same exemptions as newspapers was also rejected by the Administrative Law Judge.

On exception, petitioners argue that the shopping papers were sold to the advertisers and that these transactions were sales under the Tax Law which would exempt from tax the cost of the machinery, equipment and electricity used to produce the papers. Petitioners assert that title or possession of the shopping papers was transferred to the advertisers when Chanry distributed the shopping papers to the public as the advertisers' designees. Alternatively, petitioners argue that the shopping papers were "newspapers" within the meaning of the Tax Law and, therefore, petitioners should receive the same production exemptions from sales and use taxes as the producer of a newspaper would receive.

The Division of Taxation (hereinafter the "Division") asserts that the determination of the Administrative Law Judge should be upheld. The Division argues that Chanry was not engaged in the sale of tangible personal property because the shopping papers did not have a purchaser. The advertisers were not the purchasers of the shopping papers because the receipts paid by the advertisers to Chanry were not subject to tax, and because the advertisers did not take title or possession of the shopping papers either directly or through the "public" as their designees.

The Division asserts that Chanry was not manufacturing tangible personal property for sale but rather was selling an advertising service. In addition, the Division asserts that Chanry did not establish that it qualified for the exemptions under Tax Law § 1115(a)(12) and (c) by showing that the machinery, equipment and electricity were actually used predominately in production, or did not consist of parts having a useful life of one year or less.

We uphold the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1115(a)(12) exempts from the imposition of sales tax machinery or equipment used or consumed directly and predominantly in the production of tangible personal property for sale. Tax Law § 1115(c) exempts from tax the electricity used directly and exclusively for the same purpose. The term "sale" is defined by Tax Law § 1101(b)(5) and 20 NYCRR 526.7(a)1(1) as any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

Petitioners allege that Chanry qualifies for these exemptions from tax because it has shown that Chanry's transactions with its customers (the advertisers) were sales as defined by Tax Law § 1101(b)(5). Petitioners allege that the shopping papers were tangible personal property which Chanry was producing for sale to the advertisers appearing in that issue of the paper. The consideration consisted of the fees paid by the advertisers to Chanry. The required transfer of title or possession occurred

when the shopping papers were distributed by Chanry to the public as the designees of the advertisers.

Initially, we note that the burden of proving entitlement to a tax exemption rests with the taxpayer and statutes creating tax exemptions are strictly and narrowly construed (Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027, Matter of Young v. Bragalini, 3 NY2d 602, 170 NYS2d 805, 807). "[E]xemptions from taxation will be construed against a taxpayer unless it would defeat the settled purpose of the statute" (Matter of G & B Publishing Co. v. Department of Taxation & Fin., 57 AD2d 18, 392 NYS2d 938, 940, lv denied 42 NY2d 807, 398 NYS2d 1029, citing Matter of Grace v. New York State Tax Commn., supra.)

We do not agree that Chanry was producing the shopping papers for sale within the meaning of Tax Law §§ 1115(a)(12) and (c) and 1101(b)(5). In our view, Chanry was in the business of supplying an advertising service and the shopping papers were created, not as tangible personal property for sale, but as material for Chanry's own use in providing this advertising service. Machinery, equipment and electricity are not use in the production of tangible personal property "for sale" within the meaning of the applicable exemptions when the facts indicate that the product is being produced primarily for use in services provided by the producer and not as a separate product (see, Matter of Midland Asphalt Corp. v. Chu, 136 AD2d 851, 423 NYS2d 697, 699, lv denied 72 NY2d 806, 532 NYS2d 847;

Matter of Southern Tier Iron Works v. Tully, 66 AD2d 921, 410 NYS2d 711, 713, lv denied 46 NY2d 713, 416 NYS2d 1027; Matter of Howard Johnson Co., Tax Appeals Tribunal, July 19, 1990; Matter of Spancrete Northeast, Tax Appeals Tribunal, March 8, 1990).

The facts clearly support the conclusion that the advertiser was not buying the shopping papers but rather Chanry's services in preparing the advertisement and arranging for the printing and distribution of this advertisement through the medium of the shopping paper. The transaction between Chanry and the advertiser consisted of a fee for the design and preparation by Chanry of an advertisement of a particular style and size, which would be printed and distributed by petitioners. The advertiser's only interest in the paper was that it contain an advertisement of the size and content agreed to and that the paper be distributed in the agreed geographic area.

Since Chanry's activities consisted of advertising services of which the shopping papers were a part, even if, as petitioners argue, title or possession of the papers passed to the advertisers upon distribution to the public, Chanry does not qualify for the subject exemptions. It is the substance of Chanry's operation that controls for purposes of the production exemptions (see, Matter of Midland Asphalt Corp. v. Chu, supra; Matter of Southern Tier Iron Works v. Tully, supra; Matter of Spancrete Northeast, supra; Matter of Willets Point Contr. Corp., Tax Appeals Tribunal, September 14, 1989).

We do not agree with petitioners' assertion that Matter of B

& B Enterprises (State Tax Commn., February 6, 1985) supports their argument that the transaction between Chanry and its advertisers was a sale of tangible personal property. In B & B Enterprises, the petitioner was the publisher of certain theater program magazines known as "stagebills" for specific theater customers (Carnegie Hall and Lincoln Center). The magazines contained articles, program notes for the particular program and advertising. Under an agreement with the two theaters, the petitioner solicited the advertising and was permitted to retain all fees received from the advertisers as consideration under the contract to furnish a specified number of stagebills to each theater. The theaters in turn distributed the stagebills free of charge to individuals attending the performances. The State Tax Commission found that the publisher's costs in producing the programs were not subject to use tax because the program magazines were tangible personal property being sold by the publisher to the theaters. Although the transaction between the theaters and the publisher of the program magazines may be properly characterized as a sale, this does not convert the transactions between the publisher and the advertisers in the programs into a sale of the same tangible personal property. It is clear that the theaters' interest in the transaction was the receipt of the program magazines themselves. The theaters had no interest in the advertising provided by the publisher which appeared in the magazines except to the extent that the existence of the advertising made it possible under the contract for the theaters to receive programs for their performances without

additional consideration. On the other hand, like the advertisers in the matter before us, the main interest of the advertisers in the program magazines was in receiving the advertising services being supplied by the publisher.

Petitioners also argue that amendments made to the Tax Law in 1977 which exempted from the sales and use tax certain activities related to the production of shopping papers (L 1977, ch 884), supports their position that the transaction between Chanry and its advertisers was a sale of the shopping papers. The amendments in 1977, among other things, expanded the list of exemptions from sales and use tax in Tax Law § 1115 as follows:

> "Receipts from the retail sale of a shopping paper to the publisher of such publication shall be exempt from the tax imposed by subdivision (a) of section eleven hundred five and receipts from the sale of printing services performed in publishing such paper shall be exempt from the tax imposed by paragraph two of subdivision (c) of such section" (Tax Law § 1115[i][A]).

The activities which are exempted from sales and use tax by Tax Law § 1115(i)(A) are the publisher's purchase of the shopping paper (the printed matter) from another entity and purchases by a publisher of printing services performed in publishing the paper. If, as petitioners argue, the transaction between Chanry and the advertiser was a sale of the shopping papers, it would have been unnecessary for the Legislature to

create a specific exemption for the publisher's purchase of the shopping papers from another entity. Such a transaction would have already been excluded from tax as a purchase for resale pursuant to Tax Law §§ 1101(b)(4) or 1105(c). In construing statutory provisions it is necessary for all parts of a statute to be harmonized with each other as well as with the general intent of the whole statute (McKinney's Cons Laws of NY, Book 1, Statutes § 98; Matter of Honeoye Central School Dist. v. Berle, 72 AD2d 25, 423 NYS2d 336, 343, affd 51 NY2d 970, 435 NYS2d 721; Matter of Anderson v. Board of Educ. of City of Yonkers, 46 AD2d 360, 362 NYS2d 536, 540, affd 38 NY2d 897, 382 NYS2d 750). If the Legislature had intended to provide the publishers of shopping papers with the production exemptions it could clearly have done so. We do not find any support for petitioners' assertion that in Chapter 884 "the Legislature specifically identified the transaction between the advertiser and the publisher as a 'sale'" (Petitioners' Brief to the Tribunal, p. 17).

Petitioners argue alternatively that they should be treated in the same way as a publisher of a newspaper would be treated because shopping papers are "newspapers" within the meaning of the Tax Law. Pursuant to Tax Law § 1115(a)(5) receipts from the sale of newspapers are not subject to tax. Since newspapers are tangible personal property produced for sale, the machinery, equipment and utilities used to produce the newspapers would be exempt from tax under Tax Law § 1115(a)(12) and (c). The publisher of a newspaper would, therefore, be entitled to an

exemption pursuant to Tax Law § 1115(a)(12) and (c) for the cost of machinery, equipment or utilities used to produce newspapers for sale. It would also not have to pay tax if it purchased the newspaper or the printing services from another entity, as these would be exempt purchases for resale. The entity from which the newspaper publisher purchases could be entitled to the production exemptions as it would be producing tangible personal property (the newspapers) for sale. The Division in its regulations has indicated that a publication which otherwise meets the definition of a newspaper may be entitled to classification as a newspaper even if it is distributed free of charge (20 NYCRR 528.6[b][2], Example 2). Petitioners argue that their shopping paper conforms to the definition of a newspaper contained in the Division's regulations at 20 NYCRR 528.6(b)(1), and therefore it should receive the same production exemptions as the publisher of a newspaper would receive.

The Administrative Law Judge found that Matter of G & B Publishing Co. v. Department of Taxation & Fin. (supra, 392 NYS2d 938) was dispositive of petitioners' argument. In G & B Publishing, the petitioner asserted that the shopping paper it published was a "newspaper" and claimed an exemption from use taxes on its purchases of printing services and related supplies. The Court found that the petitioner (the publisher of the shopping paper) was not entitled to the exemptions because the shopping paper was not tangible personal property for sale and was not a newspaper within the meaning of Tax Law § 1115(a)(5). G & B Publishing was decided prior to the

legislative changes in 1977 which required a publication to meet certain requirements, including a limitation on the amount of advertising and the inclusion of items of news, in order to be classified as a shopping paper and which provided publishers of shopping papers with sales and use tax exemptions for the purchase of the papers and printing services (L 1977, ch 844).

We agree with petitioners that the shopping paper in G & B Publishing can be distinguished from those produced by Chanry in that Chanry's shopping papers conform to the requirements of Tax Law § 1115(i)(B) enacted in 1977. However, the decision in G & B Publishing is still applicable to the matter before us. While the Court in G & B Publishing focused on whether the shopping papers could be defined as newspapers, the underlying issue was whether the publisher of the shopping papers was engaged in the production of tangible personal property for sale.

Although petitioners claim that the Division has unconstitutionally applied the tax statutes by not permitting Chanry to obtain the same exemptions which are given to newspapers, Chanry's argument is really an attack on the constitutionality of the statutory scheme itself which provides different treatment for publications defined as "newspapers" and publications separately and specifically defined as "shopping papers." The jurisdiction of this Tribunal is limited to determining whether the Division has unconstitutionally applied or interpreted a particular statute, and does not encompass challenges to the constitutionality of the statute itself which is presumed to be constitutional (Matter of Geneva Pennysaver,

Tax Appeals Tribunal, September 11, 1989; Matter of Fourth Day Enterprises, Tax Appeals Tribunal, October 27, 1988). We find that the Division has correctly applied the applicable statutes to petitioners and has not acted unconstitutionally here.

If Chanry had purchased the shopping papers from another entity rather than producing the papers itself, it would not have had to pay tax to the entity from which it purchased, and the entity from which it purchased could have been entitled to the production exemptions for its machinery and utilities because it would have been engaged in the production of tangible personal property for sale. The fact that Chanry could have structured itself so as to take advantage of the Tax Law § 1115(i)(A) exemptions does not result in Chanry's entitlement to the production exemptions here. It is the form chosen by the taxpayer which is controlling and the fact that a taxpayer could have chosen a different form which would have had different tax consequences does not convert a taxable transaction into a nontaxable one (see, Matter of Greco Bros. Amusement Co. v. Chu, 113 AD2d 622, 497 NYS2d 206, 208; Matter of Ormsby Haulers v. Tully, 72 AD2d 845, 421 NYS2d 701, 702; Sverdlow v. Bates, 283 App Div 487, 129 NYS2d 88, 91; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989). If the Legislature had wanted to give the publishers of shopping papers the production exemptions, it could have done so in the 1977 amendments.

The Division has additionally argued that Chanry is not entitled to the exemption provided by Tax Law § 1115(a)(12)

because petitioners have not shown that the machinery and equipment was actually used predominantly in the production of shopping papers, or that the machinery and equipment did not have a useful life of more than one year. We do not agree with the Division on this point. The petition in this matter states: "11. Secondly, it is conceded that the machinery which was purchased is used directly and predominantly in the production of pennysavers or shopping papers." A footnote in the petition indicates that this fact and certain others were stipulated to by the auditor in discussions with petitioners' representative. The Division's answer specifically responds to each numbered paragraph of the petition prior to paragraph number 11, but does not respond to paragraph 11 or to the footnote concerning the auditor. Since the Division did not deny it, the allegation by petitioners that the machinery was used directly and predominantly in the production of the shopping papers must be taken as admitted. In addition, a review of the audit papers indicates that at the audit level, the issue was always considered by the Division to be whether Chanry was producing the shopping papers "for sale" not whether the machinery and equipment otherwise qualified for the exemption. Although we are disturbed by petitioners' failure to even address this issue since it was raised by the Division in briefs to the Administrative Law Judge and this Tribunal, we conclude that petitioners are not disqualified from entitlement to the exemption under Tax Law § 1115(a)(12) for failure to show that the machinery and equipment met the requirements of the statute regarding use and

the length of useful life.

In their reply to the answer of the Audit Division, petitioners deny the affirmative allegation made by the Audit Division that Stanley Henry was a person required to collect tax within the meaning of Tax Law § 1131(1) and personally liable for the taxes due from the corporation pursuant to Tax Law § 1133(a). However, no separate petition was submitted on behalf of petitioner Henry in which petitioner's status as a responsible officer was contested. In addition, petitioners presented no facts to the Administrative Law Judge in support of this position, nor was this issue argued in briefs to the Administrative Law Judge or the Tribunal. Therefore, as petitioner Henry has the burden of proving that he was not a person required to collect tax on behalf of the corporation or was otherwise not a responsible officer, we hold that he has failed to do so and find that petitioner Henry was a person required to collect tax within the meaning of Tax Law § 1131(1) and is personally liable for the taxes due from the corporation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Chanry Communications, Ltd. and Stanley Henry, as officer is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Chanry Communications, Ltd. and Stanley Henry, as officer, are denied; and

4. The notices of determination issued on July 10, 1987 are sustained.

DATED: Troy, New York
MAR 07, 1991

/S/
John P. Dugan
President

/S/
Francis R. Koenig
Commissioner

/S/
Maria T. Jones
Commissioner

## Appendix I

### United States Constitution
### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.Const., Amend. I

Appendix J

United States Constitution
Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV, Sec 1

Appendix K

New York Tax Law
Section 1101 (b) (5)

Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor. New York Tax Law § 1101 (b) (5) (McKinney 1987).

Appendix L

New York Tax Law
Section 1115 (a) (12)

Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, gas, electricity, refrigeration or steam for sale, by manufacturing, processing, generating, assembling, refining, mining or extracting, or telephone central office equipment or station apparatus or comparable telegraph equipment for use directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication, but not including parts with a useful life of one year or less or tools or supplies used in connection with such machinery, equipment or apparatus. This exemption shall include all pipe, pipeline, drilling rigs, service rigs, vehicles and associated equipment used in the drilling, production and operation of oil, gas, and solution mining activities to the point of sale to the first commercial purchaser.

New York Tax Law § 1115(a)(12) (McKinney 1987).

Appendix M

New York Tax Law
Section 1115 (a) (20)

Paper, ink and any other tangible personal property purchased for use in the publication of a shopping paper, as such term is defined in and limited by subdivision (i) of this section, which is to become a physical component part of such paper. New York Tax Law § 1115 (a) (20) (McKinney 1987).

Appendix N

New York Tax Law
Section 1115 (c)

Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service or whatever nature for use of consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

New York Tax Law § 1115 (c) (McKinney 1987).

Appendix O

New York Tax Law
Sections 1115 (i) (B), (C)

(B) For purposes of this subdivision, the term "shopping paper" shall mean those community publications variously known as consumer papers, pennysavers, shopping guides, town criers, dollar stretchers and other similar publications, distributed to the public, without consideration, for purposes of advertising and public information. To qualify as a shopping paper for purposes of this subdivision, the publication must also:

(1) be distributed to the public on a community-wide basis,

(2) be published at stated intervals at least fifty times a year;

(3) have continuity as to title and general nature of content from issue to issue,

(4) contain in each issue news of general or community interest and community notices or editorial comment or articles by different authors;

(5) not constitute a book, either singly or when successive issues are put together;

(6) contain in each issue advertisements from numerous unrelated advertisers;

(7) be independently owned in that the publication is not owned by or under the control of the owners or lessees of a shopping center or a merchants association or similar entity or a business which sells property or services (other than advertising) and the advertisements in such publication are not predominantly for the property or services sold by such business; and

(8) meet the requirement set forth in subparagraph (C) of this subdivision.

(C) The advertisements in such publication shall not exceed ninety percent of the printed area of each issue.

New York Tax Law §§ 1115 (i) (B), (C) (McKinney 1987).

Appendix P

New York Tax Regulations
Section 526.7 (a) (1)

The words *sale, selling* or *purchase* mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.
20 N.Y.C.R.R. § 526.7 (a) (1) (1982).

## Appendix Q

### New York Tax Regulations
### Section 528.6 (b) (1)

In order to constitute a newspaper, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated short intervals, usually daily or weekly;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public; and

(iv) it must contain matters of general interest and reports of current events.

20 N.Y.C.R.R. § 528.6 (b) (1) (1979).

(2)

No. 93-1436

Supreme Court, U.S.
FILED
MAY 6 1994
OF THE CLERK

IN THE

# Supreme Court of the United States

**October Term, 1993**

STANLEY HENRY, individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

*Petitioner,*

*against*

JAMES W. WETZLER, as COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1436

IN THE

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OCTOBER TERM, 1993.

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STANLEY HENRY, individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

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*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

---

## Brief in Opposition to Petition for Writ of Certiorari

Respondent respectfully requests this Court to deny the petition for a writ of certiorari seeking to review the opinion of the New York Court of Appeals. The judgment of the Court of Appeals was in all respects proper, and the Court of

Appeals' opinion does not conflict with any decisions of this Court or with any other state courts of last resort.

## Counterstatement of the Case

Petitioner Chanry Communications is in the business of publishing shopping papers. Petitioner Stanley Henry was, during the period in issue, an officer and/or employee of Chanry (A33, A38).[1]

After an audit for the period October 1, 1982 through February 28, 1985 the Division of Taxation issued assessments of sales and use tax due of $246,719.59[2] plus penalties and interest against both Chanry Communications and Mr. Henry. Petitioner[3] challenged the assessment and waived a hearing (A33). Petitioner and the Audit Division entered into a joint stipulation of facts (NYA9-13)[4], which was ultimately adopted by both the administrative law judge and the New York Tax Appeals Tribunal (A17, A32).

## The Joint Stipulation

The parties stipulated that Chanry runs, publishes and distributes seventeen separate free-circulation shopping papers throughout Long Island. They are circulated to the public free of charge in specifically designated geographic areas (NYA9). Chanry's business is described in the stipula-

[1]The numbers in parentheses preceded by "A" refer to pages in the Appendices reproduced at the end of the petitioner's Petition for a Writ of Certiorari. Throughout this brief the terms shopping paper and pennysaver will be used interchangeably.

[2]This amount reflects tax on some items not contested here.

[3]The petitioner is Mr. Henry individually and on behalf of Chanry.

[4]NYA refers to pages in the Appendix to petitioner's New York Court of Appeals brief.

tion as "soliciting and receiving advertisements from various advertisers" (NYA9). The advertisers choose the type of advertisement placed in the shopping paper, its style and location in the format of the shopping paper and they choose which pennysavers the ads are to be published in, based on the distribution of each. Chanry's advertising rates depend on which pennysavers publish the ads (NYA9-10). The fees obtained by Chanry from advertisers are for the advertising and delivery of the pennysavers to the public (NYA11). The distribution of the shopping papers to the public is not subject to sales tax (NYA10).

Besides the advertisements, Chanry's pennysavers include news and feature stories, reader polls, editorials, photographs and reader correspondence (NYA11). Chanry retains complete editorial control over the news and features (NYA10).

Before the Division of Tax Appeals petitioner made a statutory argument that Chanry's purchases were not subject to tax generally imposed on retail sales because they met the requirements of the production exemption contained in Tax Law § 1115(a)(12) and (c).[5] That exemption applies to machinery, equipment and electricity used to produce tangible personal property for sale. Petitioner argued that the distri-

[5]Tax Law § 1115 provides as follows:

**Exemptions from sales and use taxes**

(a) Receipts from the following shall be exempt from the tax on retail sales imposed under subdivision (a) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten: * * * (12) Machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, * * * for sale, by manufacturing, processing, generating, * * * (c)

(Footnote continued on next page.)

bution of the pennysavers to the public for free was really a sale of tangible personal property because the advertisers paid consideration to Chanry who then transferred the shopping papers to the public as the advertisers' designee (NYA12-13). Respondent argued that publishing pennysavers for free distribution is not the manufacture of tangible personal property for sale within the meaning of Tax Law § 1115(a)(12) (NYA13).

**The Administrative Determination**

The Administrative Law Judge and then the New York Tax Appeals Tribunal sustained the tax assessed, concluding that the production exemption did not apply to the production of shopping papers. In so doing, they held that the shopping papers were not produced *for sale* as Tax Law § 1115(a)(12) and (c) require (A23-30; A38-51), and that the shopping papers are not "newspapers" and, therefore, do not qualify for the exemptions granted to newspapers (A28, A45-47). Instead, they found that Chanry provided an advertising service and produced the shopping papers in connection with that service (A29; A41).

Before the Tribunal, the petitioner apparently claimed that the failure to give Chanry the same tax treatment as newspapers violated their rights under the Equal Protection clauses of the state and federal Constitutions. The Tribunal

(Footnote continued.)

* * * electricity * * * for use or consumption directly and exclusively in the production of tangible personal property, * * * for sale, by manufacturing, processing, assembling, generating, * * * shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten.

held that it had no jurisdiction to decide a facial attack on the constitutionality of a statute, but said that as far as the statute was written, it was applied properly and constitutionally to Chanry and petitioner (A47-48).

In its decision, the Tribunal pointed out that Chanry's business transactions could have been structured to take advantage of other statutory exemptions. It could have been arranged so that another publisher printed the papers and sold them to Chanry. Then Chanry would have had no responsibility for sales tax since its purchase of the papers would have been exempt under Tax Law § 1115(i)(A). The printers' purchase of machinery and equipment used to produce the shopping papers would have been exempt as the production of tangible personal property for sale (to Chanry). The form of transaction chosen by the petitioner was, however, what controlled (A48).

Accordingly, the notices of determination were sustained and the administrative petition denied (A50). The petitioner then challenged the Tribunal's decision in a proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules.

## The Appellate Division Decision

In a unanimous opinion, the Appellate Division held that petitioner's purchases did not qualify for the exemption because they were not used to produce tangible personal property for sale. Without discussion, the court summarily rejected the petitioner's remaining arguments (which included the claim that the interpretation of the statute so as to exempt paid circulation newspapers, while not exempting

free circulation newspapers, was a violation of his first amendment right to freedom of the press and his rights under the Equal Protection Clause of the United States Constitution) (A13-14).

**The Decision of the New York Court of Appeals**

In a memorandum decision the Court of Appeals affirmed the judgment of the Appellate Division (A3 et seq.). After first addressing the statutory argument, the court rejected petitioner's claim that differential treatment for pennysavers violated its first amendment rights. It found that the statute at issue was part of a "set of 'generally applicable economic regulations' designed to ensure that the incidence of the tax fal]s only on the last transaction in the production chain", citing *Minneapolis Star & Tribune v Minnesota Commr. of Revenue*, 460 US 575, 581 (1983). The New York statute was contrasted with those struck down by this Court in *Minneapolis Star & Tribune v Minnesota Commr. of Revenue*, *supra*, and *Arkansas Writers' Project, Inc. v Ragland*, 481 US 221 (1987), where the invalidated statutes were directed at the press in general or at a particular class of news entities. The court noted that the New York tax scheme denies the exemption to *any* business that does not produce a product for sale (A5).

## REASONS FOR DENYING THE WRIT

The New York Court of Appeals opinion in no way conflicts with settled law or any decisions of this Court or any other state court of last resort.[6]

Preliminarily, petitioner is challenging the interpretation given to the tax provision that grants an exemption from sales tax for purchases of items made that are used in the production of tangible personal property for sale. He is not challenging the statute itself, which is similar to those in most states throughout the country. He is attacking the interpretation given the word "sale" in that statute. Therefore, strictly speaking, he is incorrect in invoking the jurisdiction of this Court under § 1257-a on the asserted ground that *a statute* is drawn into question in that it is repugnant to the Constitution.

In any event, contrary to petitioner's assertions, this is not a case of first impression. It is abundantly clear from this Court's decisions in *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue*, 460 US 575 (1983), *Arkansas Writers' Project, Inc. v Ragland*, 481 US 221 (1987), and *Leathers v Medlock*, 499 US 439 (1991) that the First Amendment is not implicated in this situation. And contrary to petitioner's assertions, these precedents consistently adhere to the same principles and are not in need of further clarification.

In *Minneapolis Star*, this Court said that there was nothing unconstitutional in subjecting the press to a gener-

[6]Petitioner cites cases from other states in an attempt to argue that this Court's precedents are in need of clarification, but none of them conflicts with the ruling of the New York Court of Appeals.

ally applicable tax. 406 US at 575 and at 589 n 12. The tax was invalidated there because it was created expressly for the press and because the tax targeted only a small group of newspapers which bore the entire tax burden. The tax in *Arkansas Writers' Project* was struck because only some magazines were subject to tax while other magazines were not and because the distinctions drawn in the Arkansas statute were based on subject matter. Religious, professional, trade and sports journals were exempted while general interest magazines were not. In *Leathers v Medlock*, this Court held that the First Amendment does not prevent a State from imposing its sales tax in a generally applicable taxing statute on selected segments of the media while not on others. In that case all cable television services were not exempted from the tax although newspaper and subscription magazine sales were.

The prohibition in all three cases is against singling out the press for special and more burdensome treatment because of the burdens it places on the freedom of the press protected by the First Amendment.[7] In *Leathers*, this Court drew upon its prior holdings in *Grosjean v American Press Co.*, 297 US 233 (1936), *Minneapolis Star*, *supra*, and *Arkansas Writers' Project*, *supra*, to cull the rule that a statute is constitutionally suspect "when it threatens to suppress the expression of particular ideas or viewpoints * * *

[7]Petitioner is confused when he equates the notion of targeting the press with a censorial motive in doing so, and argues that this Court has left unclear, after its *Leathers* decision, whether a State must have a censorial motive before a statute will be invalidated on First Amendment grounds. (Pet pp 23-24). Targeting the press in a tax statute is not the same as doing so with the intent to censor. This Court has never wavered from the principle that a statute may not single out the press even if the motive for doing so is other than to suppress ideas.

[when it] targets a small group of speakers * * * [or] if it discriminates on the basis of the content of taxpayer speech." *Leathers v Medlock*, *supra*, 499 US at 447. The fear behind all these factors is a suppression of particular ideas. The *Leathers* Court also noted that "a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction" (499 US at 450), and that legislatures have "especially broad latitude in creating classifications and distinctions in tax statutes." 499 US at 451, citing *Regan v Taxation With Representation of Washington*, 461 US 540, 547 (1983). Thus, no paper has a right under the First Amendment to an exemption for purchases of machinery and equipment. As will be explained below, the fact that in New York some newspapers can claim one is a function of a generally applicable taxing structure in which the granting of this exemption turns on the fact that they are sold to the public.

**The Treatment of Petitioner's Papers Is a Result of the Application of a Generally Applicable Tax Scheme**

The tax does not target the press or any segment of the press. The sales tax provisions provide a generic exemption to all industries for purchases of machinery and equipment used predominantly in the production of tangible personal property *for sale*. Neither newspapers nor publications of any kind are mentioned in Tax Law § 1115(a)(12) and (c), which applies to producers of tangible personal property generally. The key to an exemption then is whether the personal property is produced for sale. In this general scheme the Legislature was avoiding a pyramiding of tax throughout the production process and determined that the customer should pay the tax at the end of the production chain. That way, the tax would only be paid once. *See*,

*Shanty Hollow Corporation v New York State Tax Commission*, 111 AD2d 968, 490 NYS2d 67 (3d Dept), *lv den*, 66 NY2d 603, 489 NE2d 256 (1985); *Imperial Manufacturing Company v State Tax Commission*, 99 AD2d 874, 472 NYS2d 753 (3d Dept), *lv den*, 63 NY2d 604, 469 NE2d 531 (1984), citing *Burger King v State Tax Commission*, 70 AD2d 447, 421 NYS2d 668 (3d Dept 1979), *mod on other grounds*, 51 NY2d 614, 416 NE2d 1024, 435 NYS2d 689 (1980); *Niagara Mohawk Power Corp. v Wanamaker*, 286 App Div 446, 448, 144 NYS2d 458 (4th Dept 1955), *affd*, 2 NY2d 764, 139 NE2d 150, 157 NYS2d 972 (1956). This means that newspapers that are sold can claim an exemption from sales tax on their purchases of machinery and equipment and newspapers that are not cannot. The law does not distinguish between what we commonly refer to as newspapers and advertising papers like the pennysaver involved here. If petitioner's pennysavers were sold to the public, he would be exempt from the sales tax imposed on his purchases of machinery, equipment and electricity used to make them.[8]

Under the New York tax scheme, which is unlike the tax provisions invalidated in *Minneapolis Star & Tribune Co. v Minnesota Comm'r of Revenue*, *supra*, and *Arkansas Writers' Project, Inc. v Ragland*, *supra*, it is within the power of the newspaper publisher to operate the business to qualify for the exemption without changing the nature of the pub-

[8]The reason pennysavers are not generally sold is because their production is not the same kind of business as the publication of a "newspaper", in the conventional sense of the word. Producers of pennysavers, like petitioner, primarily operate an advertising service, as the New York courts found, and as petitioner readily admitted in the joint stipulation (A9). The distribution of the papers circulates the advertisements.

lication. If a publisher chooses to sell the papers—even for a nominal fee—it may have the exemption on its purchases. This is true no matter whether the newspaper is large or small, or regardless of what is written in it. The sales tax falls on all businesses, not just on the press; and all businesses get an exemption the same way. For example, if a lumber company purchases special machinery to imprint small boards as rulers advertising the lumber company and those rulers are given away as promotionals, it must pay the sales tax on the purchase of the machinery.

This scheme, which focuses on retail sales, is widely used by most States and is directly related to the goal of the imposition of sales taxes. Because of its general applicability to all businesses alike it cannot be said to be either content based or aimed at the press or any segment of the press. There is thus no danger that the effect of the scheme would stifle the free expression of particular ideas.

**The Statutory Scheme Does Not Differentiate Among Members Of One Segment of the Press**

Petitioner's claim is based on his fallacious assumption that New York in its interpretation of the word "sale" in the statute effectively discriminates among members of one segment of the press. As the New York courts correctly and unanimously concluded, and as explained above, the statutory scheme focuses on the method of doing business, so that the tax falls on the last transaction in a chain of sales. It does not consider the nature of the business itself.

If some newspapers qualify for an exemption for certain purchases that does not make the imposition of tax on others unconstitutional. As this Court said in *Leathers v Medlock*,

*supra*, 499 US at 452-453, a tax scheme that effects a differential burden on speakers is insufficient by itself to raise First Amendment concerns - even if among different members of the press - unless the tax is directed at or presents the danger of suppressing particular ideas. This is particularly true when a tax effects a "penalty for a few." *Leathers v Medlock*, *supra*, 499 US at 447-448, citing *Minneapolis Star*, *supra*, 460 US at 592, and *Arkansas Writers' Project*, *supra*, 481 US at 229 and n 4. It is clear from New York's taxing structure that purchases of all things not resold (not just free circulation newspapers) are subject to tax. Since all pennysavers are given away (along with other kinds of free newspapers), they are all taxed equally. Thus, there is no "penalty for a few."

**The Exemption Is Not Based On Content**

Petitioner attempts to thrust all free circulation newspapers into one class regarding content and then argues that a failure to exempt them is discrimination based on that content. Even if all such papers suffer equally without an exemption it is unreasonable to assume that every pennysaver in New York State is similar in content. The free circulation publications described by petitioner (Pet, p 17) report community events and opinions about local matters which may run the gamut of varying points of view and include a multitude of subjects. This is unlike the statute in *Arkansas Writers' Project*, *supra*, which taxed general interest magazines while exempting religious, professional, trade and sports journals. The applicability of an exemption under that Arkansas statute turned on the subject matter (as distinguished from viewpoint) of the publication. Under the New York scheme the topics covered by a publication have no tax consequences whatever. Moreover, petitioner contradicts

himself when he claims that the tax scheme that differentiates between paid and free circulation newspapers leaves competitors on uneven ground (Pet, p 16). As he himself reports a few sentences later (p 17), the papers occupy separate spheres and are not competitors.[9]

Petitioner also has no basis for his claim that the Court of Appeals decision holds a broad danger to the suppression of political speech. He notes that the taxing structure and interpretation of the word "sale" in New York means that the purchase of machinery, equipment, or electrical services used to produce political handbills is not exempt either. Such taxation is simply an application of the generally applicable taxing provisions. The tax applies evenly to all production facilities, including those that happen to produce political handbills, regardless of the point of view, because they are given away rather than sold.

**There Is No Equal Protection Issue**

Tax statutes, by their nature, draw lines and make distinctions. It has been said by this Court time and time again that legislatures have "especially broad latitude" in this area. *Leathers, supra*, 499 US at 451, citing *Regan v Taxation With Representation of Washington*, 461 US 540, 547 (1983); *Nordlinger v Hahn*, ____ US ____, 120 L Ed 2d 1, 13, 112 S Ct 2326, 2332, (June 18, 1992); *Exxon Corporation v Eagerton*, 462 US 176, 196 (1983); *see also, Minneapolis Star, supra*, 460 US at 599, Rehnquist, CJ, citing *Allied Stores of Ohio, Inc. v Bowers*, 358 US 522, 526-527 (1959).

[9]See note 8, p 10.

Since it is not the judicial function to second-guess the policy decisions the legislatures make, a classification in a statute that neither involves fundamental rights nor proceeds along suspect lines carries a strong presumption of validity and will be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Heller v Doe*, ____ US ____, 125 L Ed 2d 257, 270, 113 S Ct 2637, 2642 (June 24, 1993); *Nordlinger v Hahn*, *supra*; *Exxon Corporation v Eagerton*, *supra*. The Equal Protection Clause protects only against invidious discrimination. *Federal Communications Commission v Beach Communications, Inc.*, ____ US ____, 124 L Ed 2d 211, 223, 113 S Ct 2096, 2102-3 (1993).

In this case, all businesses like petitioner's are treated equally by the statutory scheme. Although the tax consequences for the publishers of paid circulation newspapers are different, so is the nature of their business and product of that business. The only taxing classification made here - between purchases used to produce tangible personal property for sale and those not for sale - stands solidly on a rational base. (As described above, tax is imposed once, at the time of the final retail sale). Therefore, petitioner cannot complain of a more invidious classification based on the nature of the publication or discrimination among members of one segment of the press, and as described above, neither can he argue that the tax classification affects his First Amendment rights. Consequently, he cannot make a meritorious claim under the Equal Protection Clause.

## Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: Albany, New York
May 6, 1994

Respectfully submitted,

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No. 93-1436

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# Supreme Court of the United States

OCTOBER TERM, 1993

STANLEY HENRY, Individually and on behalf of CHANRY COMMUNICATIONS, LTD.,

*Petitioner,*

vs.

JAMES W. WETZLER, as Commissioner of the New York State Department of Taxation and Finance, and TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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6 pp

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# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner believes that the considerations warranting the granting of a writ are sufficiently stated in the petition. However, a brief reply is necessary to correct several misstatements contained in respondents' Brief in Opposition.

1. Respondents assert that petitioner has not properly invoked this Court's jurisdiction under 28 U.S.C. § 1257 (a) because he challenges the constitutionality of a State's interpretation of a tax statute, and not the tax statute itself. (Br. in Opp., p. 7). Respondents are wrong. The validity of a statute is drawn into question, for purposes of § 1257 (a), when the application of that statute is challenged on constitutional grounds. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979); *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 473, n. 4 (1989) (citing *Japan Line, Ltd., supra*).[1] Petitioner challenges respondents' interpretation of the definition of a "sale" on Free Press and Equal Protection grounds, thereby properly invoking this Court's jurisdiction under § 1257 (a).

2. Respondents contend that the Papers[2] constituted "shopping papers" and "pennysavers", relying on terms utilized by the parties during the course of the administrative proceedings. (Br. in Opp., pp. 2-3). Respondents do this to subtly communicate the notion that the Papers are not newspapers and, therefore, are not worthy of First Amendment protection. Respondents' characterization of the Papers, and the terminology used at the administrative level, are immaterial. The Papers were newspapers for purposes of the New York Tax Law and the First Amendment. (Pet., pp. 6-7).

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[1] Although *Japan Line, Ltd.* and *Volt Information Sciences, Inc.* were decided prior to the 1988 amendment to § 1257, that amendment did not affect the requirement that the validity of a statute be drawn into question.

[2] Petitioner will continue to use the terms defined in the petition.

3. Respondents assert that the statutory definition of a sale does not violate the Free Press Clause because it does not target the press or any segment of the press. (Br. in Opp., p. 9). However, it is the respondents' interpretation of that statutory definition that results in the discriminatory taxation of free-circulation newspapers. Respondents acknowledge this. (Br. in Opp., p. 10).

4. Respondents contend that the statutory definition of a sale is a generally applicable economic regulation, designed to ensure that the incidence of tax falls only on the last transaction in the production scheme.

> [T]he Legislature was avoiding a pyramiding of tax throughout the production process and determined that the customer should pay the tax at the end of the production chain. That way, the tax would only be paid once .... This means that newspapers that are sold can claim an exemption from sales tax on their purchases of machinery and equipment and newspapers that are not cannot.

(Br. in Opp., pp. 9-10). Respondents' argument makes no sense since there is no tax on the sale of newspapers. See, New York Tax Law § 1115 (a) (5) (McKinney 1987).

5. Respondents ignore the inconsistencies in the precedent respecting discriminatory taxation of the press (Pet., pp. 18-24) and conclude that the "precedents consistently adhere to the same principles." (Br. in Opp., p. 7). If respondents' conclusion was true, the outcome in all three cases would have been the same; however, the outcomes of *Minneapolis Star* and *Leathers* were inconsistent: *Minneapolis*

*Star* struck a tax that affected only one segment of the press while *Leathers* allowed a tax that affected only one segment of the press. In addition, *Leathers* relied on authority protecting "speakers" rather than the "press", which leaves doubt as to whether those distinct First Amendment values will be treated the same.

6. Respondents challenge petitioner's contention that this Court has left unclear whether a state must have a censorial motive before a statute will be invalidated on First Amendment grounds. (Br. in Opp., p. 8, n. 7). Respondents ignore the fact that the Court upheld the tax in *Leathers* because, in part, it found no "purposeful attempt" to discriminate. 499 U.S. at 448. The Court also inquired whether intent existed in connection with the "additional basis" for finding discriminatory taxation. 499 U.S. at 449-50. However, the Court stated, in the same decision, that motive was not an issue. 499 U.S. at 445 (citing *Minneapolis Star*, 460 U.S. at 592). Thus, after *Leathers*, the role of legislative intent is not clear.

7. Respondents contend that "[e]ven if all [free circulation newspapers] suffer equally without an exemption it is unreasonable to assume that every pennysaver in New York State is similar in content." (Br. in Opp., p. 12). Respondents fail to recognize, however, that petitioner's content-based argument rests on a comparison of the content of paid circulation newspapers and the content of free circulation newspapers, and not a comparison of the content of several free-circulation newspapers. Even if respondents were correct in their assertion that free circulation newspapers include a "multiple of subjects" (Br. in Opp., p. 12), such subjects traditionally differ from that of paid circulation newspapers.

8. Respondents assert that petitioner cites cases from other states which do not conflict with the New York Court of Appeals' ruling. (Br. in Opp., p. 7, n. 6). Petitioner did not cite the foreign state decisions for this purpose but, instead, cited such decisions to illustrate how the inconsistencies in *Minneapolis Star, Arkansas Writers'* and *Leathers* cloud precedent, resulting in misapplication by the foreign state courts. The fact that the New York Court of Appeals' ruling joins these foreign state court decisions in its misapplication of this Court's rulings simply adds support to petitioner's illustration.

9. In an effort to refute petitioner's argument that review would allow this Court to clarify the relationship between Freedom of the Press and Equal Protection, respondents offer a less than rational basis for discriminatory taxation among members of one segment of the press: the avoidance of tax pyramiding. (Br. in Opp., p. 14). That does not make any sense here because, as newspapers, the Papers were not subject to the secondary tax in respondents' imagined pyramid.

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May 19, 1994